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EMPLOYEE PENSION PROTECTION ACT

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Mr. KENNEDY, from the Committee on Labor and Human Resources, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 685]

The Committee on Labor and Human Resources, to which was referred the bill (S. 685) to amend title I of the Employee Retirement Income Security Act of 1974 to clarify the applicability of rules relating to fiduciary duties in relation to plan assets of terminated pension plans and to provide for an explicit exception to such rules for employer reversions meeting certain requirements, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

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I. Summary of the Bill

Title I, the Employee Pension Protection Act, S. 685, as amended, modifies section 404 of ERISA to require that the fiduciary of a pension plan determine that the:

(1) distribution of residual assets to an employer upon the termination of a defined benefit pension plan;

(2) purchase of annuities for participants and beneficiaries upon the termination of a pension plan; or

(3) transfer of excess pension assets of a defined benefit pension plan to a retiree health benefits account

is in the interests of participants and beneficiaries in compliance with the fiduciary responsibility requirements of ERISA.

Title II, the Pension Portability Act, amends ERISA to improve workers' retirement income security by enhancing pension coverage and portability.

II. Background and Need for Legislation

Since 1983, thousands of employers have terminated pension plans to raid the assets that had been set aside for retirement benefits. Millions of workers and retirees have lost promised retirement benefits. This practice has jeopardized workers' retirement security and has undermined the integrity of our country's private pension system. Public policy must ensure that the interests of workers and retirees in their retirement benefits is protected.

A. The United States' National Retirement Policy

Over the past fifty years, the United States has worked to develop a pension system that meets the retirement needs of its citizens. The United States began to consider the retirement needs of individuals during the Depression. Faced with millions of unemployed Americans, our nation recognized the need to ensure that funds are set aside today to address the needs of the future. With the enactment of the Social Security Act in 1935, the United States took its first step in establishing a national policy to set aside money during individuals' working years in order to provide income when they no longer work. During consideration of the Social Security Act, it became clear that Social Security would only provide a subsistence level of retirement income and that individuals would need to save additional funds to provide them with an adequate income during retirement.

Although employer-sponsored pension plans existed prior to the development of Social Security, it was not until the post-World War II period that private pension plans experienced rapid growth. The increased establishment of employer-sponsored retirement plans is attributable both to the fact that Social Security did not provide sufficient retirement income and also to court decisions ruling that pension benefits were deferred compensation, and thus, a mandatory subject of collective bargaining. (See e.g., *Inland Steel Company* v. *N.L.R.B.*, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949)).

There are two basic types of employer-sponsored pension plans: defined benefit and defined contribution plans. Defined benefit

plans are designed to provide long-service workers with a guaranteed level of income during retirement. Retirement benefits generally are calculated pursuant to a formula that is based on an employee's entire working life with an employer in order to provide a specific percentage of a worker's final or average salary during retirement. Contributions are pooled in a trust fund from which benefits are paid. Over seventy percent of the participants in pension plans are covered by a defined benefit plan.

In contrast, defined contribution plans are akin to bank accounts in which employers contribute a specific dollar amount each year to individual employee accounts. Defined contribution plans do not guarantee a specific level of income during retirement. It is the responsibility of each individual to ensure that sufficient funds are set aside. Although the use of defined benefit plans are not grown significantly since 1974, defined contribution plans have become increasingly popular in recent years and are often used as a supplement to a basic defined benefit plan.

After World War II, the United States came to rely on a three-tiered system to set aside income for individuals for their retirement years. Social Security, financed jointly through mandatory employer and employee contributions, provides as the first tier a minimum level of income support to individuals. Employer-sponsored pension benefits supplement Social Security and serve as the second tier. These benefits are encouraged through the tax-deferred treatment of all contributions made to and interest earned on pension funds. (This tax subsidy costs the federal government approximately $50 billion a year, the single largest federal tax break.) Individuals also may have a third tier of income if they are able to accumulate private savings to supplement further their income needs in retirement.

The importance of the private retirement system has been magnified over the past several decades. Pressure to reduce Social Security benefits and the inability of individuals to set aside sufficient discretionary savings have increased reliance on the private retirement system. In addition, Americans are living longer and retiring earlier, increasing the needs for a strong private system to provide income support to individuals during their retirement years.

B. THE ENACTMENT OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)

Despite the increased reliance on private retirement plans, few standards initially existed for these plans. The Welfare and Pension Plan Disclosure Act of 1958 required the disclosure of plan information to the Secretary of Labor and to participants, if requested. The Internal Revenue Code required the Internal Revenue Service to determine whether benefit plans were "qualified" to receive favorable tax treatment. Neither statute provided adequate safeguards to the anticipated benefit rights of workers and retirees.

During the 1960's, the lack of protections for workers reached a crisis. Although private pension plans covered 30 million workers and contained $150 billion in assets in 1973, too often the pensions promised to workers proved illusory. In particular, inadequate vest-

ing and funding standards had left many workers without pension benefits. Because there were no minimum vesting standards, over 50% of workers over age 50 were not vested in their retirement benefits. Employees with many years of service frequently lost their retirement benefits upon termination of employment.

In addition, thousands of pension plans were terminated without sufficient funds to pay out the pensions promised to workers. A joint study conducted by the Labor and Treasury Departments in 1972 found that in 500 of these terminations, almost 20,000 workers lost $49 million in retirement benefits. Only 20% of private pension plans had sufficient assets to pay out benefits earned as of 1970 and no federal insurance program existed to guarantee promised pension benefits.

The growing concern over pension benefit losses was aptly expressed by President Richard M. Nixon, when in a message to Congress on December 8, 1971 he stated, "[w]hen a pension plan is terminated, an employee participating in it can lose all or a part of the benefits which he has long been relying on, even if his plan is fully vested . . . even one worker whose retirement security is destroyed by the termination of a plan is one too many." (reprinted in S. Rep. No. 127, 93rd Cong., 1st Sess. 5 (1973)).

Congress responded to the need to prevent abuse and protect the retirement benefits expected by American workers by enacting the Employee Retirement Income Security Act (ERISA) in 1974. The overriding goal of ERISA was and remains to protect the pension benefits promised to millions of workers. Senator Jacob Javits, ranking minority member of the Senate Committee on Labor and Public Welfare, stated that ERISA

> * * * represents a series of fundamental guarantees made to every American worker—guarantees which will secure for millions of Americans the expectation of a decent retirement income in combination with Social Security. These guaranttes are nothing less than a pension 'bill of rights' to which every worker—regardless of his occupation, salary or status—is entitled. (120 Cong. Rec. 29935 (August 22, 1974.)

Senator Lloyd Bentsen, a chief sponsor of ERISA, hailed this landmark legislation for the American worker, which was intended to "* * * insure that upon retirement, sufficient funds are available to provide workers with their earned pension benefits * * * [and to] * * * guarantee piece of mind for countless American workers." (120 Cong. Rec. 29949 (August 22, 1974)). The Senate Committee on Labor and Public Welfare stated that ERISA was "* * * addressed to the issue of whether American working men and women shall receive the private pension plan benefits *which they have been led to believe would be theirs upon retirement* from working lives. It responds by mandating protective measures, and prescribing minimum standards for promised benefits." (S. Rep. No. 127, 93rd Cong., 1st Sess. 1 (1973) (emphasis added)). See also, House Committee on Ways and Means, H.R. Rep. No. 779, 93rd Cong., 2nd Sess. 2 (1974)

> [the three goals of the bill were] * * * (1) to increase the number of individuals participating in retirement plans; (2) to make sure that those who do participate in such plans do not lose their benefits as a result of unduly restrictive forfeiture provisions or failure of the plan to accumulate and retain sufficient funds to meet its obligations; and (3) to make the tax laws relating to such plans fairer by providing greater equality of treatment under such plans. * * *

Upon signing ERISA into law on September 2, 1974, President Gerald R. Ford stated, "[u]nder this law, * * * the men and women of our labor force will have much more clearly defined rights to pension funds and greater assurances *that retirement dollars will be there when they are needed.* * * * I believe we can all be proud that the Government has now taken action to make workers' lives more secure." (10 Presidential Documents; Gerald R. Ford, No. 36, 1085 (1974) (emphasis added)).

ERISA established minimum standards for pension plans including standards relating to coverage, vesting, benefit accrual, and plan funding. Other requirements enacted to protect plan participants and beneficiaries include detailed reporting and disclosure rules and fiduciary standards for the use of pension plan assets. ERISA adopted longstanding trust law principles to ensure that plan fiduciaries act solely in the interests of participants and beneficiaries and that assets are held for the exclusive purposes of providing benefits to participants. ERISA also established the Pension Benefit Guaranty Corporation (PBGC), a Federal government agency that guarantees the pension benefits promised to workers and retirees in defined benefit pension plans.

Particular mention must be made of the pension plan funding rules established by ERISA. Congress was acutely concerned with the widespread problem of underfunding in pension plans. Congress felt a strong need to encourage sufficient pension plan funding to ensure that pension plans would contain the monies needed to pay future retirement benefits. As stated by the Senate Finance Committee, it is

> * * * essential for pension plans to be adequately funded in accordance with a contributions schedule which will produce sufficient pension funds to meet the obligations of the plan when they fall due. Such an adequate contributions schedule for funding pension plans not only protects the pension rights of employees but also provides an orderly and systematic way for employers to pay their pension costs. (S. Rep. No. 383, 93rd Cong., 1st Sess. 22 (1973)).

Congress intentionally decided to encourage pension plan funding so that "* * * these plans will accumulate sufficient assets within a reasonable time to pay benefits to covered employees when they retire." (H.R. Rep. No. 1280, 93rd Cong., 2nd Sess. 283 (1974)). In later years, the Financial Accounting Standards Board (FASB), which sets accounting standards for employers, required employers to report future retirement benefits based upon projected salary levels on financial balance sheets. As will be discussed

below, the funding rules established under ERISA and subsequently strengthened have generally succeeded in achieving adequately funded pension plans. In 1974, only 20 percent of pension plans contained sufficient funds to meet existing liabilities. In 1984, 80 percent of pension plans were adequately funded to meet their current obligations.

C. THE THREAT TO RETIREMENT BENEFITS FROM PENSION PLAN RAIDING

Over fifty million workers and retirees depend on the private retirement system for current and future benefits. (The remaining sixty million workers are not covered by a pension plan.) The question facing our nation is whether the money will be there to provide those fifty million Americans with the benefits they have been led to expect upon their retirement.

For the past seven years, through pension plan raids, employers have jeopardized the retirement security of millions of workers and their beneficiaries, reduced the solvency of the PBGC and subjected the federal government to sizable tax losses. As pension plans have become better funded under ERISA's funding requirements, employers have been greatly tempted to use pension assets for other corporate purposes. While ERISA expressly prohibits an employer from removing assets from an ongoing pension plan, a large number of employers have circumvented ERISA and terminated their plans in order to take the funds they cound not otherwise get. This raiding of what are argued to be "excess" pension assets has reduced the retirement benefits of millions of workers and retirees. Since 1983, two thousand large employers have terminated defined benefit plans in order to recapture $21 billion. Two million workers and retirees have been affected by these large terminations and what are known as "employer reversions". Tens of thousands of smaller employers have taken employer reversions as well.

The Committee has heard testimony from dozens of workers and retirees whose "horror stories" typify the harm inflicted by employer pension raids. Mr. Glen Howard received a lump-sum pension benefit of only $712.00 after 12 years of employment when Harper & Row terminated the plan to recapture $10 million. Mr. Wiley Jones received a mere $100 a month after 30 years of service, while his former employer Alabama Dry Dock and Shipbuilding Company took $5 million from the pension plan. Workers and retirees from the Underwood Co., Raymond International, Getty Oil, Celanese, Reeves Brothers, American Standard, FMC Corp., Coleman Lantern and Pacific Lumber testified how they were left with reduced or frozen benefits while the companies they gave their working lives to took millions of dollars out of their pension plans. The newspapers have frequently reported on the pension raids by major companies, including Exxon ($1.6 billion), United Airlines ($960 million), Getty Oil ($360 million), Union Carbide ($500 million), Goodyear ($400 million), and Merrill Lynch ($240 million).

In 1984, a Department of Labor study documented the harm to workers from pension raids. Based on an analysis of over 5000 pension plans, the Labor Department found that ". . . for each $100 of anticipated real pension benefits based on service to date, workers

can expect to lose $45 as the result of plan termination." ("*Termination of Sufficient Defined Benefit Plans.*" Office of Pension and Welfare Benefit Programs, Department of Labor, summary 6, (1984)). The Department noted that as a result of a termination, "[t]he terminated benefit will not increase with inflation during the workers' remaining tenure with the firm as [it] would if the plan was maintained intact. Thus, in real dollars, a significant reduction in benefits is anticipated upon termination. (Id, part I, P. 5.) As an example, the Department showed how a fifty-five year old worker currently earning $12,000 a year could expect to be earning $33,000 at retirement at age sixty-five based upon inflation and salary increases. In an ongoing plan, retirement benefits would be based upon years of service and the $33,000 salary. If the plan is terminated, retirement benefits would be calculated based on years of service and the $12,000 salary.

Most distressingly, the Department found that older workers experienced the greatest harm from premature terminations. Fifty-five year old workers with twenty years of service could lose $63 for each $100 of real expected benefits. Although a forty-five year old worker with ten years of service could lose $86 of real expected benefits, the Department found that "* * * younger workers can received more than a 'fair' offset from a more generous second plan but older worker[s] [sic] do not have sufficient remaining service to offset their losses by the time they retire." (Id, appendix B, pps. 2-3). A 1986 study commissioned by the Department of Labor, also found that participants can lose significant benefits. The study found that older workers are more likely to lose benefits if a defined contribution plan replaces the terminated plan and all participants lose benefits if no new plan is established. (Hay/Huggins Company, "Pension Plan Terminations with Asset Reversions," Department of Labor (1986)). Increasingly, employers have replaced terminated plans with defined contribution plans or no plans at all. In 1988, 75% of terminated plans were replaced by a defined contribution plan or by no pension plan.

Another study conducted by Brandeis University for the American Association of Retired Persons (AARP) had findings similar to the Department of Labor studies. The Brandeis study found that based upon the loss of future salary increases, a sixty year old worker loses 28 percent of expected retirement benefits and a fifty-five year old worker loses 63 percent of expected retirement benefits. If future salary levels and additional years of service are looked at, a sixty year old worker with thirty years of service at the time of termination loses 50 percent of the value of the benefits that would have been received at age sixty-five and a fifty-five year old foregoes a 117 percent increase in retirement benefits. The study confirmed that older workers do not have sufficient years of service remaining to make up these lost benefits under a defined contribution plan. (Leavitt, research associate, Brandeis University, "The Impact of 'Overfunded' Pension Terminations on Workers," p. 5, published by the American Association of Retired Persons No. 8602 (1986)).

All too often these terminations are related to merger and takeover activity. According to the General Accounting Office, 40% of the terminations between 1982-87 occurred incident to a merger or

takeover. ("Pension Plans and Leveraged Buy-Outs," General Accounting Office, No. HRD-89-20 (1989)). The Department of Labor concurs: "[t]he higher is a firms [sic] debt-to-equity ratio [as exists after a leveraged buy-out] the more likely is the firm to terminate a pension plan in order to obtain a reversion. In some cases, firms have explicitly indicated that the reason for pension termination and reversion was to reduce takeover-related debt." ("Trends in Pensions," Department of Labor, Pension and Welfare Benefits Administration 1 (1989)).

D. WHY PENSION PLANS APPEAR "OVERFUNDED"

There are two primary reasons why defined benefit pension plans may contain what are referred to as "excess" assets. First, defined benefit plans promise to pay retirement benefits based upon final salary levels and years of service. Therefore, liabilities accumulate slowly in the beginning when salary and service are low, but escalate rapidly in the later years of a plan as salaries and years of service increase. ERISA's funding rules recognize this escalating liability: they require employers to pre-fund pension benefits so as to ensure that sufficient funds are set aside to provide the benefits needed decades into the future when workers retire. In fact, more properly funded pension plans will contain what are considered "excess" assets at many points in the funding cycle of the plan. These "excess" assets are actuarially needed to satisfy growing benefit obligations. As noted previously, FASB requires employers to report these projected obligations on financial balance sheets. Most employers, in order to meet their growing long-term obligation and for the substantial tax advantage, choose either to fund their plans by a level amount each year or to make greater contributions in the early years of a plan. This enables employers to avoid an overly large obligation as the plan matures and benefits become due. The tax-deferred treatment for funds contributed to a pension plan and the interest earned thereon provides a tremendous financial incentive to employers to advance fund their plans. As a result, decades of pre-funding have led to billions of dollars set aside for benefits promised in the future.

The accumulation of assets in pension plans to pay out future retirement benefits is closely analogous to the reserve that should be accumulating in the Social Security trust funds. Similar to the goal of the funding standards adopted by Congress for private pension plans under ERISA, Congress in 1983 sought to advance fund Social Security to accumulate assets that would meet future retirement needs. There is enormous public concern today that the intended reserve that is supposed to be accruing in Social Security does not exist because the funds are being used to pay off the federal deficit. Both the Social Security trust fund and private pension plans need to contain sufficient assets to pay out future retirement benefits. The existence of a "reserve" in Social Security and the existence of "excess" assets in private pension plans are both crucial if we are to be able to meet the retirement needs of the baby boom generation over the coming decades.

Strong investment returns over the past decade are the second major factor contributing to the amount of assets accumulating in

pension plans. Until the late 1970's, it was common for pension plans to assume rates of return on the plan's investments averaging 3 to 4 percent. It took several years for many pension plans to recognize that rates of return had soared closer to 10 percent, and in several years, rates of return climbed as high as 20 or 30 percent. Many pension plan financial advisors were reluctant to assume that investment returns could remain at such increased levels and therefore were slow to adjust assumed rates of return. Although pension plans are required to amortize investment returns if greater (or lower) than estimates over future years, the prior limit of 15 years was too long to reduce "excess" assets in the short run. (The Omnibus Budget Reconciliation Act of 1987 reduced the period for amortization of new gains and losses to 5 years.)

At the same time that employers were using low rates of return for purposes of plan funding, they were using high rates of return for purposes of valuing the current value of workers' retirement benefits upon plan termination. These rates were often based on high rates of return quoted by annuity insurance providers. The higher the rate of return used, the lower is the current value of workers' retirement benefits and thus, the greater is the amount of "excess" assets. Workers receiving lump sum distributions were especially hurt by this practice because no worker could get a bank or insurance company to guarantee them double digit returns for the next 20 or 30 years. Neither the IRS nor the PBGC stopped employers from "gaming" the system by using different rates of return until this practice was held illegal by the courts. (See, *District 65, UAW* v. *Harper & Row, Publishers, Inc.*, 576 F. Supp. 1468 (S.D. N.Y. 1983)).

In sum, the so-called "excess" assets contained in pension plans represent two primary components: advance funding of future pension obligations and better than expected investment returns. In an ongoing pension plan, advance funding is used to provide future benefits. Favorable investment returns are used to reduce employer contributions, provide a cushion against potential investment losses and pay for benefit increases for active and retired participants. If the plan continues in existence, the funding of the plan will even out over time. It is only by terminating the pension plan that an employer can subvert the retirement purposes of these funds and take all of the "excess" assets.

E. ERISA DID NOT ANTICIPATE PENSION PLAN RAIDING

Both title I of ERISA and the Internal Revenue Code provide that plan assets must be used to provide benefits exclusively to particips and beneficiaries and that these assets generally may not inure to the benefit of an employer, Both statutes also generally permit an employer to terminate a pension plan at will (although termination is a subject of bargaining in collectively bargained plans). Upon termination, the plan must pay out liabilities that have accrued up to the date of termination and the employer may recover remaining residual assets if the plan explicitly provides for such a reversion. (During consideration of the Internal Revenue Code Act of 1938, Congress debated the termination of pension plans. Pension plans are trusts and much of their treatment is

taken from trust law. Under trust law, contributions to irrevocable trusts are tax-deductible and contributions to revocable trusts are not. The House of Representatives took the position that pension plans should be irrevocable to receive deferred tax treatment. The Senate was reluctant to deny employers access to erroneously contributed funds. Congress deviated from trust law and gave pension plans a hybrid treatment, enabling pension plans to be tax-deferred and revocable but only after all fixed and contingent plan liabilities had been satisfied. The legislative history to the 1938 tax code explicity permitted employers to recover only those assets that were "due to erroneous actuarial computations during the previous life of the trust". (S. Rep. No. 1567, 75th Cong., 3d Sess. 24 (1938)). The IRS used the language contained in the legislative history in its regulations, as discussed below. Congres adopted the "exclusive benefit" standard to ensure that pension plans did not become a source of tax abuse by employers.

The problem in the law arises because plans are funded on an ongoing basis, yet assets are recovered on a termination basis. Even though funds have been contributed to pay retirement benefits based on future salary levels, if the plan is terminated before the workers reach retirement age, the employer is only liable for benefits the workers have accrued up to the date of plan termination based upon salary levels at the time of termination. It is clear from ERISA's declaration of policy and legislative history that the focus of ERISA was on underfunded pension plans and that employer pension raiding was not anticipated. Section 2 of ERISA emphasizes that

> * * * owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits * * * it is therefore * * * the policy of this Act * * * [to improve] the soundness of such plans by requiring them to * * * meet minimum standards of funding. * * *

The drafters of ERISA did not anticipate the incentive to terminate created by the disparity between the assets contributed to meet the ongoing funding needs of a pension plan and the liabilities owed upon premature plan termination. Nor did they foresee the substantial increase in investment returns. Throughout this century, the overriding pension plan problem has been underfunding. Until the 1980's, few pension plans had sufficient assets to create the incentive to terminate. The drafters of ERISA permitted employers to recover residual assets because they did not foresee that the provision could be abused. Because abuse has occurred, ERISA must be amended to limit the exception to the general rule that pension plan assets are to be used for the exclusive purpose of providing retirement benefits. The Department of Labor estimates that approximately $250 billion is currently accumulated in pension plans for liabilities not yet due. The overriding goal of ERISA was and should remain to protect the benefits promised to and expected by workers under pension plans.

F. THE GROWING PROBLEM OF PENSION PLAN RAIDING

During the past seven years, many employers have not been able to resist the ready cash that pension plans contain. The ability to raid plans came to the attention of the public, and other employers, when in 1981, a German conglomerate bought the Great Atlantic and Pacific Tea Company (A&P) and terminated the pension plan, which helped to finance the takeover. The publicly reported terminations by A&P, and also by Harper & Row in 1981, showed how employers could terminate pension plans and be liable only for the benefits that workers have accrued up to the date of termination. Because plan termination is the sole means through which an employer may obtain pension assets, employers have an incentive to terminate pension plans to gain access to the assets.

The A&P pension plan termination was the beginning of a disturbing trend. In 1981, 35 large employers terminated pension plans and recaptured pension assets. By 1983, the number had risen to 166 and by 1984, 329 companies had applied to recover pension assets of over $1 million per company. Celanese took $325 million from the pension plan of 7300 participants. JP Stevens took $98 million from its pension plan covering 9100 participants. Firestone took $285 million from the plan of 26,000 workers. Cities Service received $60 million from the plan of its 2400 workers. Timken, Home Insurance Company, AMF, St. Regis and Bulova Watch were among the companies taking tens of millins of dollars from the retirement plans of thousands of workers and retirees.

This trend led many workers and retirees, unions, and several members of Congress to question the legality of this practice. The agencies with responsibility for regulating defined benefit plans (i.e., the Department of Labor, the Department of Treasury, and the PBGC) became concerned that employers' interest in obtaining excess assets would result in the discontinuance of defined benefit plan coverage for large numbers of American workers. The PBGC was concerned that the ability to terminate a well-funded defined benefit plan, strip out all assets above termination liability and then reestablish a less-well-funded defined benefit plan increased the risk of liability to the PBGC and abused the PBGC insurance system. Several Congressional hearings were held in both the House and Senate on this issue, and members of Congress urged the Administration to review the problem. Senator Howard M. Metzenbaum and Congressman Edward R. Roybal introduced legislation to impose a moratorium on employer reversions until the problem was reviewed. At the same time, employer trade associations began to lobby the Administration to permit them to take "excess" pension assets through "sham" terminations (described below).

It took several years for the Reagan Administration to take a position on the legality of these pension plan terminations. Initial agency positions leaned toward the position that some reversion practices were illegal. (See letter from S. Allen Winborne, Assistant Commissioner, Employee Plans and Exempt Organizations, Internal Revenue Service (December 7, 1983), reprinted in "Overfunded Pension Plans, Joint Hearing before the House Select Committee on Aging and the Subcommittee on Labor-Management Relations

of the House Committee on Education and Labor," 99th Cong., 1st Sess. 17 (1985).) But the agencies were overruled by the President's Cabinet Council on Economic Affairs. During this time, the IRS revised its regulations that permitted employers to recover upon termination only those assets which were the result of "erroneous actuarial computations [that occurred] during the previous life of the trust" (Reg. 111, Sec. 29-165-2 (1939)).

Since the enactment of the Internal Revenue Code of 1938, the IRS regulations had substantively applied the language contained in the legislative history of the 1938 Act and limited employer reversions to "actuarial error". Actuarial computations during the life of the trust include assumptions regarding employee turnover, mortality rates, retirement ages, investment returns, etc. The difference between termination liabilities and funded future liabilities is not the result of an erroneous actuaril computation made during the life of the trust, but is the result of the employer's unilateral decision to terminate the plan. In 1983, the IRS formally changed its substantive position and held all residual pension assets are the result of actuarial error. (Rev. Rul. 83-52 (1938); for a detailed explanation of this issue, see, Stein, "The Curious Origins and Curiouser Evolution of the Term 'Erroneous Actuarial Computations' in Treasury Regulation Section 1.401-2(b)," 43 Tax Notes 335 (April 17, 1989).)

In mid-1984, the Department of Labor, the Internal Revenue Service and the PBGC, jointly issued the Asset Reversion Implementation Guidelines. The Guidelines bent to employer lobbying efforts and sanctioned pension plan terminations with employer reversions. The Guidelines permitted "sham" terminations where employers either split plans in two (putting all of the "excess" in one plan which is then terminated and retaining the other plan) or terminate a plan and immediately reestablish and identical plan stripped of assets (spin-off terminations and termination/reestablishments). The Guidelines were criticized by many (including several Members of Congress) who believed that stronger action could and should be taken to safeguard benefit security. (See, "Overfunded Pension Plans," supra; letter from Robert G. Monks, former Administrator, Pension and Welfare Benefit Programs, Department of Labor (April 25, 1985), reprinted in "Employer Assets Reversions from Terminated Pension Plans," Hearing before the Senate Committee on Labor and Human Resources Subcommittee on Labor, 101st Cong., 1st Sess. 124 (1989).) The legal basis for the Guidelines remains in doubt as the Guidelines were not published in the Federal Register as proposed rules, nor were they subject to public comment.

The Guidelines allow employers to recover all assets in excess of termination liabilities. Employers may recover all assets set aside for future benefits and investment returns. This leaves any remaining or reestablished defined benefit plan with few or no assets to serve as a "cushion" to pay future retirement benefits. The elimination of any asset cushion severely jeopardizes participant benefit security. A reestablished plan no longer contains sufficient assets to provide benefits to workers in the future, and undermines ERISA's funding rules that have been designed to require employers to contribute (and permit them to deduct) amounts that will

lead to the accumulation of assets sufficient to pay future retirement benefits. The cushion also protects the plan against adverse investment performance inevitable at some point in an ongoing pension plan. Allowing assets to be stripped following a good investment period leaves the plan vulnerable to an eventual decline in investment returns.

Better than expected returns also may be used to provid benefit increases. For retirees, the stripping down of a plan through a Guidelines termination generally means that there are no assets left to provide cost-of-living adjustments. Prior to the "legalization" of plan raiding, over 50 percent of retirees received at least one benefit adjustment within the 5 year period from 1978–82. Since employers have been able to strip pension assets to take reversions, retiree benefit adjustements have declined. Between 1983–87, only 30 percent of retirees received at least one cost-of-living adjustment. ("Employee Benefits in Medium and Large Firms, 1988," Bureau of Labor Statistics, Department of Labor, Bulletin No. 2336 (1989).)

In addition, the Guidelines require employers to purchase pension annuity contracts from insurance companies in order to relinquish their pension obligations. The Guidelines establish no criteria for the purchase of annuities. It was not until 1986 that the Department of Labor explicitly stated that the purchase of annuities upon plan termination was and had always been subject to all of the fiduciary standards of ERISA. The Department of Labor has failed to take any further action delineating the proper protection of the pension benefits for individuals with annuity contracts. Recent concerns over the solvency of an liability for pension annuity contracts has raised additinal troubling issues for Congress as discussed below.

As a result of the Guidelines, pension plan terminations increased dramatically. In 1985, 582 large employers terminated plans and recaptured $6 billion in pension assets. The Chubb Corp. took $88 million from the pension plan of 5800 participants. Fireman's Fund Insurance raided $103 million from the plan of 17,000 workers. American Express took $90 million from the plan of 21,000 employees. Avis, United Airlines, Stauffer Chemical, Marine Midland Banks, Union Carbide, FMC, Cannon Mills, Revlon and Levi Strauss joined the flood of employers terminating plans to take millions of dollars set aside for the retirement benefits of thousands of workers and retirees. Congress remained concerned about the effect of these terminations on workers' pension benefits and required the Secretary of Labor to conduct a study of employer reversions upon pension plan termination (section 11017(b) of title XI, the Single Employer Pension Plan Termination Insurance Amendments, of the Consolidated Omnibus Budget Reconciliation Act of 1985, Public Law 99–272). While the Administration studied the issue, Congress took preliminary steps to redress some of the federal government's tax loss. The Tax Reform Act of 1986, created a 10% excise tax on employer reversions.

The Reagan Administration study found that terminations with employer reversions did jeopardize the retirement benefit security of workers and retirees. The Administration concluded that terminations "reduce participants' benefit security with respect to future

benefit accruals and may also discourage the employer from granting ad hoc benefit increases or cost of living allowances for retirees." (See, Administration statement presented by William E. Brock, Secretary of Labor, "Overfunding and Underfunding of Pension Plans," Joint Hearing before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources and the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 100th Cong., 1st Sess. 29 (1987)).

On February 19, 1987, the Administration submitted to the Congress a series of legislative recommendations relating to the termination and funding of single-employer defined benefit pension plans. The proposal submitted to Congress recommended legislative improvements for both overfunded and underfunded plan terminations, including disincentives and limitations on employer reversions following a plan termination. The House Committee on Education and Labor and the Senate Committee on Labor and Human Resources adopted many of the provisions contained in the Administration proposal, including the restrictions on employer reversions, and included them in the Omnibus Budget Reconciliation Act of 1987. Separate provisions were passed by the House Committee on Ways and Means and the Senate Committee on Finance. Congress enacted both sets of recommendations. The Labor Committees' provisions were deleted in conference after an impasse arose over the provisions affecting underfunded plans.

In 1988, Senator Metzenbaum and Congressman William L. Clay introduced legislation to impose a moratorium on employer reversions. The Senate approved a resolution encouraging Congress to increase the excise tax on reversions to 60 percent until May 1989 to stop reversions while Congress enacted permanent legislation. The Senate Committee on Finance included the temporary 60 percent excise tax as part of the Technical and Miscellaneous Revenue Act of 1988 and the provision was passed by the Senate. Although the provision was deleted in conference, a permanent increase in the excise tax to 15 percent was adopted. After pressure from Congress, the Treasury Department agreed to suspend the issuance of all determination letters permitting employers to recover pension assets upon termination from October 24, 1988 until May 1, 1989 and agreed to review the reversion issue.

In February 1989, the Senate Subcommittee on Labor held a hearing to receive testimony from the Administration on its efforts to reconsider the reversion problem. In April, Senator Metzenbaum, chairman of the Subcommittee on Labor, introduced S. 685, the Employee Pension Protection Act and conducted a hearing on the bill. S. 685, as introduced, required employers to establish new pension plans and provide participants with a share of "excess" pension assets before an employer could take a reversion. The Senate Committee on Labor and Human Resources included S. 685 in the Committee's recommendations to the Committee on the Budget as part of the Omnibus Budget Reconciliation Act of 1989. The Committee also included provisions to permit limited transfers of pension plan assets to retiree health benefit accounts, increase premiums paid to the PBGC and increase civil penalties for violations of ERISA and various labor statutes. The House Committee on Education and Labor included separate reversion and transfer

provisions in its budget reconciliation recommendations. Both the Senate Committee on Finance and the House Committee on Ways and Means included pension transfer provisions in budget reconciliation. Subsequently, a bipartisan Senate agreement deleted all non-revenue enhancing provisions, including S. 685, from the Budget Reconciliation Act. The House adopted each committee's provisions. In conference, all four committees agreed to delete the termination and transfer pension provisions as part of a "stripped-down" budget reconciliation.

In 1990, further termination activity prompted the Senate Subcommittee on Labor to conduct additional hearings on the pension raiding problem. Particular attention was paid to the termination of the Coleman Lantern and Pacific Lumber pension plans. Both of these terminations involved the financing of a takeover and the purchase of pension annunities of questionable value (discussed below). The Pacific Lumber company terminated its pension plan months after the family-owned company was taken over and $50 million was used to pay for the takeover. The pension plan of another family-owned company, Coleman Lantern, was also terminated months after a takeover and $30 million was taken out by the acquiring conglomerate.

G. THE OVERRIDING NEED TO PROTECT PENSION BENEFITS

Pension plan terminations by employers that seek to take out money set aside to provide future retirement benefits continues to be a major public policy concern. Setting aside funds for future benefits is as important for private pension plans as it is for the future of the Social Security system.

Our country faces a rapidly aging population. Within the next two decades, the baby boom generation will begin to retire. Our society must prepare to meet their retirement needs today. Social Security will exist to meet minimum retirement income needs when the baby boom generation retires, but it surely will not provide these retirees with sufficient income. Private pension benefits will be crucial if we are to meet the needs of our society. It is imperative that private retirement plans be protected as a source of retirement income. Although pension plans "seem" well funded today, that money is a fraction of what will be needed to meet future pension promises. (Many employers recognize this and have urged Congress and the IRS to increase the maximum pension funding limit so that employers can properly fund their future pension obligations. Both the Association for Private Pension and Welfare Plans and the ERISA Industry Committee have argued that limiting employers' ability to fund future pension obligations reduces long-term retirement security. Larry Sher, on behalf of APPWP, stated that the current limit on pension funding ignores the long-range nature of pension plans and discourages defined benefit plans. (See, Meder, "New Funding Standards are Flawed, IRS Told," Employee Benefit Plan Review 8 (1988)). Congress is unlikely to permit increased tax-subsidized pension plan funding as long as employers can terminate plans and strip out assets).

The termination of adequately funded pension plans over the past several years is typical of the short-term thinking that has

jeopardized long-term prospects for our nation. Pension plans were never intended and should not be used to meet short-term corporate needs. Nor should they be used to finance or thwart mergers and takeovers. The availability of pension assets has served to stimulate unjustified takeover activity. Corporate managers have argued that as corporate officers their obligation is to their stockholders. They claim that if the use of pension plan assets is in the financial interest of the company's stockholders, management will recapture those funds. But in some cases, particularly pension raids where the monies were used to prevent a takeover, management's actions serve only to entrench management, not to benefit the stockholders. In these cases, both participants and stockholders have been powerless to protect their interests. Congress is the only body with the power to step in and change the law so that tax-subsidized retirement benefits are protected.

In addition to society's long-term interest in assuring that pension plans remain adequately funded to provide future retirement benefits, these terminations have caused significant harm to individuals and the federal government and are thus contrary to public policy.

Since 1983, at least 2 million workers have been affected by pension terminations and asset stripping. The numbers are likely substantially greater, but neither the PBGC nor the IRS fully tracks terminations. As early as 1984, a Department of Labor study found that, on average, workers' retirement benefits were reduced by almost half after an employer reversion. Subsequent Labor Department reviews also have found that these terminations jeopardize workers' retirement security. Those workers closest to retirement age are hit the hardest because they have fewer years of service remaining to re-earn lost retirement benefits.

Despite these adverse consequences, the Reagan Administration permitted terminations and reversions through the Guidelines, apparently in the hope that allowing employers to strip plans would encourage the continuation of defined benefit plans. Unfortunately, the Guidelines have had exactly the opposite effect. Although in 1984, 50 percent of employers terminating plans then reestablished identical defined benefit plans, that percentage has steadily dropped. By 1989, less than 25 percent of employers set up comparable plans. In 75 percent of the terminations, the workers wind up either with a less secure pension plan, which is no longer federally insured, or they wind up with no pension plan at all. The shift to defined contribution plans also has affected long-term investment activity. Defined contribution plans have a greater need for liquidity and are thus more heavily invested in short-term investments than defined benefit plans. Representatives of the Bush Administration, as well as many employers, have decried the emphasis on short-term investments by pension plans. Ironically, these are some of the very same individuals who have helped turn pension plans into short-term financial investors.

Pension raids have reduced employee confidence in employers and our private system. As workers have found themselves helpless to protect their retirement funds, labor-management tensions have been exacerbated. No longer do employees trust their employer to keep their pension plans secure. As a result, employees increasing-

ly prefer to control their own pension plans either through individual accounts or joint administration. Even more distressingly, employees have lost faith in the private pension system. Before pension raids, the private pension system was an example of the free enterprise system at its best. Through tax incentives, employees and employers planned for the future. But the short-term greed of many employers has shattered the promise of retirement benefit security. The raiding of pension plans has undermined confidence in the entire private retirement system.

Furthermore, the federal government loses revenue due to these terminations. Prior to 1986, there was no excise tax on the assets recovered by employers. This represented a tremendous windfall to employers because the interest earned over the years by those pension plans had never been taxed. Even though Congress finally enacted a 10 percent excise tax in 1986, to recoup some of its revenue loss (increased to 15 percent in 1988), a 1989 General Accounting Office study found that the federal government is still losing hundreds of millions of dollars each year on these terminations. According to the General Accounting Office, the excise tax would have to be increased to 25 to 35 percent, depending on which tax rate is used, just to come close to recovering the federal government's average tax loss. (In some cases, the excise tax would have to be increased to 65 to 85 percent), depending on the tax rate used.) ("Pension Plan Terminations, Recapturing Tax Benefits Contained in Asset Reversions," General Accounting Office, No. HRD-90-51BR (1989)). Because tax rates are lower now than when employers initially deferred taxation and because employers are able to use net operating losses to offset taxation on reversions, it is unlikely the federal government can ever recover its revenue loss.

Additionally, to the extent new pension plans are reestablished but without a cushion of assets, new tax-deferred contributions are made, further increasing tax losses. (If the plans had continued in existence, they would have been above the funding limit and no further tax deductions taken.) The federal government has lost hundreds of millions of dollars from the tax-deductions taken for contributions to "stripped-down" pension plans.

Finally, the solvency of the PBGC has been impaired by the exodus of employers from the defined benefit system. Annual premiums assessed on the universe of defined benefit plans support the PBGC. As that pool has decreased, the PBGC's revenue base and financial stability have been impaired. The PBGC is currently underfunded by $1 billion and has $2 billion in additional liability pending before the Supreme Court. It is not unlikely that the PBGC will experience further substantial liability claims over the next several years. In addition, as pension asset cushions are stripped, more plans become subject to potential insolvency. The PBGC also may be the subject of substantial liability should any pension annuity contracts required upon plan termination not be paid out.

Regrettably, the Bush Administration and employer trade organizations have been unwilling to consider legislative solutions to protect the assets contained in private pension plans. They raise two primary objections to any legislation. First, the fear that if employers cannot recoup pension assets they will not properly fund

their pension plans. Second, that without the ability to recover assets, employers will not establish new defined benefit plans. Both arguments are unfounded for several reasons. Current law requires that employers properly fund their pension plans. Even in the absence of reversions, employers are required by ERISA and FASB to provide adequate funding for their pension plans. Additionally, prior to the legalization of pension raiding between 1983–1984, employers properly funded their plans without the "incentive" of being able to obtain a reversion. The tax-deferred treatment of all pension contributions remains a powerful incentive to fund pension promises. With respect to the claim that without reversions employers will not establish new defined benefit plans, the facts are to the contrary. Since the enactment of ERISA, the creation of defined benefit plans has remained stagnant. If anything, it is the minimum standards of ERISA that have affected the creation of defined benefit pension plans. Most medium and large size employers already have defined benefit plans and do not need to create new ones. Small employers rarely have pension plans at all, and have never relied heavily on defined benefit plans. Ironically, it is current law that is jeopardizing the funding and maintenance of defined benefit pension plans. Because of the ability to raid plans, employers are terminating defined benefit plans and stripping needed assets out of pension plans.

In summary, to continue to permit employers to strip needed assets out of pension plans is an abuse of the pension system and against public policy. Pension raiding reduces workers' retirement benefits. The raiding practice also harms the ability of our society to provide for the retirement needs of our country, abuses the tax system, loses federal revenues, and weakens the PBGC. The ability to raid pension plans has made a mockery of our private pension system. The goal of ERISA was to prevent abuse and protect workers' pension plans. There is an acute need for legislation to protect pension plans and restore the integrity of our pension system.

H. THE PURCHASE OF PENSION ANNUITIES TO PROVIDE RETIREMENT BENEFITS

In examining the effects of employer reversions, members of Congress and others have become concerned over the status of the annuity contracts purchased to provide pension benefits. Under ERISA, the preferred form of retirement benefit is an annuity, i.e., a monthly stream of pension payments to retirees, in most instances provided through an insurance company. Therefore, when a pension plan terminates, current and future retirees will receive their monthly pension checks from an insurance company. Because so many employers have terminated pension plans to recapture funds, the number of individuals covered by annuity contracts has grown tremendously.

In recent months, concern has grown over the security of these pension annuity contracts. One major insurance carrier that holds the pension annuity contracts of hundreds of thousands of individual has experienced financial difficulty. Although the insurance industry to date has been stable, the potential exists that an insurance company will fail to meet its pension obligations.

This emerging issue has impressed upon Congress and the Administration the need to address two legal aspects of annuity purchases. First, although the purchase of annuities, upon termination or otherwise, is plainly subject to title I of ERISA, including the fiduciary responsibility requirements, it appears that some employers do not know what actions are required to meet ERISA's fiduciary standards. The fiduciary responsibility requirements of ERISA require that the purchase of annuities be made solely in the interests of participants and beneficiaries, for the exclusive purposes of providing benefits, in a prudent manner under all of the circumstances and in a diversified portfolio to minimize the risk of loss. Unfortunately, the Committee has learned of several annuity purchases that may not have met ERISA's fiduciary responsibility standards. The testimony of several individuals suggests that some pension plan fiduciaries believe that they are able to satisfy the fiduciary standards without adequate inquiry into the insurer's ability to pay benefits over thirty to forty years. Indeed, at least one witness thought that a high rating from one of the insurance rating services was alone sufficient to meet the requirements of the fiduciary standards. Because the Department of Labor has failed to make clear the obligations of fiduciaries in the purchase of annuities, the Committee feels compelled to reiterate that the purchase of annuities is subject to the full weight of the fiduciary responsibility requirements of ERISA, including the common law independent investigation and advice requirements.

Second, questions have arisen as to whether annuity contracts remain insured by the PBGC. The PBGC is currently taking the public position that it does not insure annuity contracts. In the past, the PBGC through regulations had held otherwise. This liability issue is currently being hotly contested. Many members of Congress as well as the AFL-CIO and the American Association of Retired Persons (AARP) strongly believe that the law requires PBGC to continue to insure annuities. To the extent that termination reversions have resulted in workers losing their PBGC insurance protection, Congress must clarify the law in this area. In no event should Congress permit workers to lose pension benefits due to the failure of an insurance carrier.

I. TRANSFERS OF PENSION ASSETS TO RETIREE HEALTH BENEFITS

The issue of transferring "excess" pension assets to retiree health benefits plans was raised during the Reagan Administration's study of the funding and termination of defined benefit pension plans in 1987. Employers had begun lobbying the Administration because their obligations for retiree health benefits were growing rapidly while the law restricted an employer's ability to prefund the benefits on a tax-deductible basis. Ideally, employers want to make tax-deductible contributions so that they may fully fund their retiree health benefit liabilities. Given the federal deficit, the Treasury cannot afford new tax deductions. The proposal to transfer pension assets is intended by employers to serve as both a band-aid to provide interim retiree health benefit funding and a foot in the door for future employer attempts to obtain full tax-subsidized retiree health benefit funding. The Administration's legislative pro-

posal to Congress recommended that both ERISA and the Internal Revenue Code be amended to permit the transfer of pension assets, above a sufficient cushion, to help employers meet their growing retiree health care liability.

The proposal was quite controversial for several reasons. Longstanding pension policy prohibits transfers of pension plan money from ongoing pension plans for any purpose. Currently both ERISA and the Internal Revenue Code prohibit any transfer of pension plan assets from an ongoing plan. The money contributed to pension plans is the deferred wages of all of the workers in the pension plan, wages set aside to provide them with pension benefits. It is not clear why these deferred wages should be used to underwrite a totally separate corporate obligation, *i.e.*, the requirement to fund a promise to pay for retiree health benefits.

Apart from this fundamental problem, there are numerous additional concerns. The individuals covered by a retiree health benefits plan may not necessarily be the same retirees covered by the pension plan. This raises the troubling problem of transferring the deferred wages of one group to a non-identical group of individuals. Even among retirees, the value of retiree health benefits varies considerably. Early retirees, those under age 65, benefit the most from retiree health benefits. But retirees over age 65, who are covered by Medicare, have a lesser need for retiree health benefits and receive benefits of less value. These retirees may prefer than their deferred wages be used for other retirement income purposes. Furthermore, existing law sets no standards for the provision of retiree health benefits. Members of Congress and the Administration agreed that any serious proposal had to ensure that tax-free contributions to retiree health benefit plans actually benefited retirees. The transfer issue raised complex policy questions that needed detailed consideration. Due to the complicated nature of the proposals being debated with respect to overfunded and underfunded plans, the transfer proposal was deleted in 1987.

During this time, the Financial Accounting Standards Board (FASB) drafted a proposed statement to require employers to report their retiree health liabilities on corporate balance sheets. The proposed statement was finally released in February 1989. The statement establishes accounting standards for employers' accounting of post-retirement benefits other than pensions, primarily post-retirement health care. The statement will generally become effective in 1992.

The reporting requirements contained in the FASB accounting statement have created incentives for many employers, particularly large employers, to reduce these retiree health benefit liabilities from their balance sheets prior to 1992. Because the federal government cannot afford separate deductions for retiree health benefits, some large employers have resumed their effort to amend ERISA and the Code to permit transfers of pension assets to offset existing retiree health liabilities. These companies have argued that such transfers would increase federal revenues in the short run, because health care deductions need not be taken if untaxed pension funds are used to pay for benefits. The federal government's urgent need for revenues has transformed what was once an issue of public policy into an attractive fiscal proposal.

During 1989, both the House Committee on Ways and Means and the Senate Committee on Finance included provisions in the Omnibus Budget Reconciliation Act to permit limited transfers of pension plan assets for retiree health benefits. Both the House Committee on Education and Labor and this Committee also included provisions permitting employers to transfer pension assets to retiree health benefit accounts in the Budget Reconciliation Act. These latter provisions were included alongside of provisions limiting employer reversions upon plan termination. The members of the House and Senate Labor Committees argued forcefully and successfully the interrelationship of these two issues. Permitting an employer to transfer pension assets out of a pension plan for any purpose is a form of pension raiding comparable to permitting the employer to terminate the plan and take a reversion. The transfer is even more beneficial to the employer because it is not subject to either the 15 percent excise tax or corporate income tax.

The Senate agreed that these issues must be considered and resolved together, and deleted both provisions from the Budget Reconciliation bill. Although both provisions were adopted by the House, the conferees agreed not to resolve these complex policy issues as part of a stripped-down Budget Reconciliation Act.

While the Committee is sympathetic to the growing health care, and especially retiree health care, liabilities of employers, the Committee is wary of draining pension plans to meet this liability. Although retiree health benefits do bear some relationship to the retirement income needs of individuals, they are still separate employer obligations. Allowing the tax-free transfer of pension assets should not in any way jeopardize current or future pension benefits. Any pension assets transferred must be used to provide retiree health benefits to the same retirees covered by the pension plan. The retiree health benefits affected must be protected by federal law. Although ERISA contains detailed standards to protect the pension rights of workers, neither ERISA nor any other federal law protects the health care rights of workers. We must add federal protection to health care responsibilities funded by the transfer. Finally, the Committee strongly believes that employers should not be permitted to engage in both types of "reversions". If Congress is to permit limited ongoing pension asset transfers, the transferred pension assets must be protected if the plan is terminated.

The Administration previously had expressed a reluctance to permit pension asset transfers. But the President's 1991 Budget request included a provision comparable to that considered by Congress last year. It is considered likely that the revenue needs of the federal government will continue to keep this proposal under consideration. This Committee intends to permit limited transfers of pension assets to retiree health benefits only if the interests of workers and retirees are protected in the event of a transfer or a termination.

III. History of the Legislation

On February 9, 1989, the Senate Subcommittee on Labor held an oversight hearing to receive testimony from the Bush Administration on the Administration's consideration of the pension plan ter-

mination problem. On April 4, 1989, Senator Metzenbaum introduced the Employee Pension Protection Act of 1989 (S. 685). The Senate Labor Subcommittee held a legislative hearing on April 11, 1989.

On July 5, 1989, the House Committee on Ways and Means adopted provisions to permit a one-time transfer of "excess" pension plan assets to retiree health benefit plans as part of its Budget Reconciliation Act recommendations. On July 13, the House Committee on Education and Labor adopted provisions to impose a ban on employer reversions and permit limited transfers of "excess" pension assets to retiree health benefit accounts as part of its Budget Reconciliation recommendations.

On July 20, 1989, the Senate Committee on Labor and Human Resources adopted the Committee's recommendations to the Budget Reconciliation Act, which included S. 685, amendments to ERISA to permit the limited transfer of excess pension assets to retiree health benefit accounts, and user fees on the filing of annual employee benefit plan financial reports. On October 4, 1989, the Senate Committee on Labor and Human Resources amended its Budget Reconciliation recommendations, retaining S. 685 and the retiree health benefit provisions, but replacing the user fees with provisions to increase civil penalties for violations of ERISA, the Mine Safety and Health Act and Occupational Safety and Health Act, and to increase the PBGC premium. On October 10, 1989, the Senate Committee on Finance included provisions to permit the limited transfer of "excess" pension assets to retiree health benefits.

On October 5, 1989, the House approved H.R. 3299, the Omnibus Budget Reconciliation Act, which included the provisions dealing with pension terminations and transfers that had been approved by the Committees on Education and Labor and Ways and Means. On October 13, 1989, the Senate agreed to delete all non-revenue enhancing provisions from the Budget Reconciliation Act, including S. 685, both the Labor Committee and Finance Committee retiree health provisions and the civil penalty provisions, and passed H.R. 3299, as amended. A conference was requested on the differing House and Senate Budget Reconciliation bills. In deference to the request for a "stripped-down" reconciliation bill, the House receded to the Senate bill.

On February 13, 1990, the Senate Subcommittee on Labor conducted an additional hearing on pension raiding risks in light of the growing concern over the solvency and security of pension annuity contracts. On February 28, 1990, the Senate Committee on Labor and Human Resources favorably ordered reported S. 685, the Employee Pension Protection Act, as amended by an amendment in the nature of a substitute offered by Senators Metzenbaum and Kassebaum (R-KS), by a recorded vote of 10-5, with one member not voting.

IV. Hearings

Public hearings were conducted by the Subcommittee on Labor in Washington, D.C. on February 9, 1989, April 11, 1989, and February 13, 1990 to consider the pension plan termination and em-

ployer reversion problem and S. 685, The Employee Pension Protection Act.

The following individuals presented testimony on February 9, 1989:

Zack Carter, President, Industrial Union of Marine and Shipbuilding Workers of America, Local 18;

C.W. Gilbert, retired employee of the American Standard Company, Pittsburgh, PA;

Peter M. Kelly, partner, Bell, Boyd & Lloyd, on behalf of the U.S. Chamber of Commerce, Chicago, IL;

Vance Anderson, employee relations counsel, Mobil Oil Corp., on behalf of the Association of Private Pension and Welfare Plans, New York, NY;

Bert Seidman, director, Department of Occupational Safety, Health and Social Security, AFL-CIO, Washington, DC;

Frank Higgins, American Association of Retired Persons, Washington, DC;

Dana Trier, tax legislative counsel, U.S. Department of the Treasury, Washington, DC;

David M. Walker, Assistant Secretary, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC.

The following individuals presented testimony on April 11, 1989:

Morton Bahr, President, Communication Workers of America, Chairman, AFL-CIO Subcommittee on Pension Terminations and Reversions, Washington, DC;

Jack Guildroy, member, board of directors, American Association of Retired Persons, Washington, DC;

Karen Ferguson, Executive Director, Pensions Rights Center, Washington, DC;

Eugene Kalwarski, principal and consulting actuary, Milliman & Robertson, Inc., Washington, DC;

Chester S. Labedz, Jr., benefits counsel, Textron, Inc., on behalf of ERISA Industry Committee, Washington, DC;

Arthur Wilson, president, Local 8-898, Oil, Chemical and Atomic Workers International Union, Christiana, DE;

Fred Kelso, Trenton, NJ.

The following individuals presented testimony at the hearing on February 13, 1990:

Wayne Osterhout, Wichita, KS;

Lester Reynolds, Fortuna, CA;

Howard Gittis, Vice Chairman, MacAndrews and Forbes Holdings, Inc., New York, NY;

Larry Jones, President, Coleman Company, Wichita, KS;

Norman Stein, professor, University of Alabama, School of Law, Tuscaloosa, AL.

V. Committee Views

Over the years that the Committe has considered the pension termination and employer raiding problem, numerous legislative approaches have been suggested to safeguard retirement funds. The Committee has found that although certain approaches protect pension assets and participants' benefits better than others, there

are several approaches that serve the Committee's goals. In the past, the Committee has adopted provisions that mandate a fixed allocation of what are considered to be "residual" pension assets. The legislation reported by the Committee seeks to achieve a similar result that protects participants and beneficiaries without mandating a specific allocation of pension plan assets. The reported bill achieves the goals of the Committee in a manner that reflects the consensus of a bipartisan majority of the members.

It is the goal of the Committee:

(1) to restore the intent of ERISA and the intent of Congress to protect workers' retirement benefits;

(2) to remove the inventive to terminate pension plans solely or primarily to recover taxed deferred assets; and

(3) to ensure that to the extent an employer chooses to terminate a pension plan, the interests of participants and beneficiaries in the assets contributed to fund future retirement benefits, and the gains earned thereon, are fairly protected.

Generally, the amendment adopted by the Committee amends ERISA to require that the applicable fiduciary of the plan apply the fiduciary standards of ERISA to determine the allocation of pension plan assets where an employer seeks to recover residual plan assets. Currently under ERISA, decisions affecting pension plan assets generally must be determined by the plan fiduciary in accordance with the fiduciary responsibility standards. The Committee bill amends ERISA to subject to decision to allocate residual pension assets to an employer to the same fiduciary standard that applies to other pension asset decisions—including the disposition of plan assets on termination.

The Committee bill does not affect the decision to terminate a pension plan. Just as ERISA established fiduciary standards and rules for the allocation of assets to prevent abuse and protect participants and beneficiaries, this change in the law uses ERISA's existing standards to remedy an abuse not anticipated by ERISA. The bill does not change any other "settlor" or employer decision. The bill simply modifies the exception to the general rule that pension plan assets must be used solely in the interests of participants and beneficiaries. The Committee expects that this standard will be applied in accordance with the statutory requirements of ERISA, the legislative history of ERISA and the interpretation given by the courts to fiduciary obligation under ERISA.

A. TRUST LAW, ERISA AND THE INTERNAL REVENUE CODE

ERISA generally codified the fiduciary standards existing under the common law of trusts with modifications when necessary to meet the special needs of employee benefit plans. Trust law generally treats all monies contributed to qualified pension plans as contributed on behalf of the individuals who are to receive benefits under the trust. The assets contained in a trust must be managed exclusively in the interest of the individuals covered by the trust and the individuals who control the assets in the trust must do so exclusively in the interest of the individuals covered by the plan.

The historical trust law concept was codified in the Internal Revenue Code in 1938 and in ERISA in 1974. The exclusive benefit

standard is the standard that generally governs all decisions affecting pension plan assets. As was noted by one district court, "ERISA as a whole is a complex statute, but the concepts which underlie its fiduciary provisions are straightforward * * *" (*Freund* v. *Marshall & Isley Bank*, 485 F. Supp. 629, 639 (W.D. Wis. 1979)).

The fiduciary standards are contained in part 4 of title I of ERISA. Section 401 of ERISA makes clear that the fiduciary responsibility standards apply to all employee benefit plans under ERISA. Section 402 specifies that every employee benefit plan shall provide for a named fiduciary who shall have authority to control and manage plan assets. Section 403 establishes the general rule that all assets of an employee benefit plan are to be held in trust, shall not inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants and beneficiaries. (Section 403 references the title IV of ERISA provisions that permit an employer to recover residual assets upon plan termination under certain conditions as an exception to the general rule that pension assets are to be used for the exclusive purpose of providing benefits. Section 403 allowed this exception because Congress believed residual assets only would encompass funds "resulting from erroneous actuarial computations" and no abuse was foreseen. The Committee bill amends section 404 to prevent the abuse that has arisen and thereby protect participants and beneficiaries.)

The cornerstone of the fiduciary standards is contained in section 404. Section 404 of ERISA provides that,

> [a] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of providing benefits to participants and beneficiaries; and defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV (relating to PBGC termination insurance).

This statutory standard applies to all decisions affecting the use of pension plan assets under ERISA. This is the standard that has guided fiduciaries during the fifteen years since the enactment of ERISA and under trust law.

The legislative history of ERISA further clarifies the application of the fiduciary standards. Both the House and Senate versions of ERISA contained similar fiduciary provisions and the essence of these provisions emerged from conference.

The Senate Committee on Labor and Public Welfare explained that the fiduciary provisions "* * * incorporate the core principles

of fiduciary conduct as adopted from existing trust law, but with modifications appropriate for employee benefit plans. These salient principles place a twofold duty on every fiduciary: to act in his relationship to the plan's fund as a prudent man in a similar situation and under like conditions would act, and to act consistently with the principles of administering the trust for the exclusive purposes previously enumerated * * *" (S. Rep. No. 127, 93d Cong., 1st Sess. 30 (1973)).

The Senate Finance Committee similarly made it clear that "fiduciaries are required to discharge their duties solely in the interests of participants and their beneficiaries and in a manner which will not jeopardize the income or assets of the fund." (S. Rep. No. 383, 93d Cong., 1st Sess. 8 (1973)). The Finance Committee was particularly concerned about preventing transactions where the employer put pressure on a plan fiduciary to divert plan assets to the employer who "needed working capital or [was] in bad financial condition" and that the fiduciary would acquiesce in this demand. (Id., at 94.)

The fiduciary standards were intended to restrict an employer's access to or misuse of pension plan assets. As stated by Senator Harrison Williams, Chairman of the Senate Committee on Labor and Public Welfare, the intent of the fiduciary rules was to

> * * * impose strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling or disposition of pension or welfare plan assets. The objectives of these provisions are to make applicable the law of trusts; to prohibit exculpatory clauses tht have often been used in this field; to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust. (120 Cong. Rec. 29927 (August 22, 1974)).

As both the House and Senate Labor Committees made clear, Congress believed that "* * * a fiduciary standard embodied in Federal legislation is desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state." (S. Rep. No. 127, 93d Cong., 1st Sess. 29 (1973); H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973)). The conference report emphasized that the managers "* * * expected that courts will interpret the prudent man rule (and other ficuciary standards) bearing in mind the special nature and purposes of employee benefit plans." (H.R. Rep. No. 1280, 93d Cong., 2d Sess. 302 (1974)).

B. JUDICIAL APPLICATION OF THE FIDUCIARY RESPONSIBILITY STANDARD

During the 15 years since the enactment of ERISA, the federal courts have heeded the intent of Congress with respect to the fiduciary standards and have created a federal common law interpreting the fiduciary standards of ERISA. the leading decision articulating the application of the fiduciary standards is *Donovan* v. *Bierwirth*, 538 F. Supp. 463 (E.D. N.Y. 1981), affirmed 680 F.2d 263 (2nd Cir. 1982), cert. denied 103 U.S. 488 (1982).

In *Bierwirth*, both the district and appellate courts laid out the judicial test to determine compliance with the fiduciary standards.

The Secretary of Labor had brought a civil action against three pension plan fiduciaries alleging that their purchase of company stock for the pension plan was prompted by their desire to defeat a takeover attempt and was not made in compliance with their fiduciary responsibilities under ERISA. All three fiduciaries were also officers of the company. The company had publicly announced its intention to fight the takeover bid. The pension plan fiduciaries voted against selling any corporate stock already held by the plan and voted to purchase additional corporate stock. In both cases, the plan would have realized a substantial financial gain because the company attempting the takeover was offering to purchase the stock at almost $10 more per share than the market price of the stock at the time. The fiduciaries made their decision without a full or independent investigation. The fiduciaries conculted with counsel to the corporation but failed to consult with any independent counsel for the pension plan.

As explained by Judge Friendly, writing for the Second Circuit Court of Appeals, section 404 of ERISA "impose[s] three different although overlapping standards. A fiduciary must discharge his duties 'solely in the interests of the participants and beneficiaries'. He must do this 'for the exclusive purpose' of providing benefits to them. And he must comply 'with the care, skill, prudence, and diligence under the circumstances then prevailing' of the traditional 'prudent man'." (*Bierwirth*, supra, 680 F.2d at 271).

In some cases, the fiduciary may have a dual loyalty because he or she may also be an officer or have an obligation to the employer. Both the district and appellate courts recognized that ERISA permits fiduciaries to act on behalf of a pension plan even though they may have a loyalty to the employer as well. But, in those cases where the officer of a company is also a fiduciary of the plan, Judge Friendly made it clear that "their obligations must be made with an eye single to the interests of the participants and beneficiaries." (Id.) As stated by the district court, the "solely in the interest of the participants and beneficiaries" standard requires that a fiduciary's loyalty to the pension fund participants "is the only loyalty which may affect his judgement." (*Bierwirth*, supra, 538 F. Supp. at 468).

To meet the "solely in the interest of participants and beneficiaries" standard in cases of dual loyalty, Judge Friendly made clear that ERISA "* * * imposes a duty on [fiduciaries] to avoid placing themselves in a position where their acts as officers or directors of the [employer] will prevent their functioning with the complete loyalty to participants demanded of them as [fiduciaries] of a pension plan." (680 F.2d at 271). Given such a dual loyalty, fiduciaries have an obligation to explore how to fulfill their fiduciary obligations solely in the interests of the participants. Judge Friendly advised that, "[o]ne way for the [fiduciaries] to inform themselves would have been to solicit the advice of independent counsel * * *" (Id., at 272).

In cases where fiduciaries can "scarcely be unbiased", Judge Friendly made clear that "* * * at least [fiduciaries] were bound to take every feasible precaution to see that they had carefully considered the other side, to free themselves, if indeed this was humanly possible, from any taint * * *" (Id., at 276). the appellate court and

several other courts have expressed concern that in certain situations a fiduciary may not be able to remove the taint and should remove himself or herself and appoint a neutral fiduciary for the relevant decision. Although several courts have said they would clearly prefer fiduciaries to take this prophylactic course of action, they were reluctant to order such action in the absence of legislative or administrative directive. (Id., see also, *Leigh* v. *Engle*, 727 F. 2d 113, 132 (7th Cir. 1984); *Danaher Corporation* v. *Chicago Pneumatic Tool Company*, 635 F. Supp. 246, 250 (S.D. N.Y. 1986)).

ERISA provides an additional safeguard against conflicts of interest by flatly prohibiting certain transactions. The additional proscriptions of the prohibited transaction rules were not the primary claims in *Bierwirth*.

In addition to acting "solely in the interests of participants", the fiduciary must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use * * *" The district court in *Bierwirth* laid out that the prudent man rule requires the fiduciary "to make an indpendent inquiry into the merits of a particular investment decision." (*Bierwirth*, supra, 538 F. Supp. at 470). The court noted that, "[a] review of the fiduciary's independent investigation is one of the well-established yardsticks against which the courts have customarily tested fiduciary conduct for prudence." Id.

In those situations where the fiduciary has dual loyalties, his independent investigation "* * * *must be both intensive and scrupulous and must be discharged with the greatest degree of care* that could be expected under all the circumstances by reasonable beneficiaries and participants of the plan." Id. (emphasis added).

Among those factors to be considered in determining whether a fiduciary decision was made prudently, the district court in *Bierwirth* looked to the thoroughness of the fiduciary's investigation; whether experts in the field were consulted, including independent legal counsel and investments advisors; whether there was a consensus of opinion in the community on the issues involved; whether all of the information gathered was used; whether every reasonable effort was made to secure protection in case of an adverse decision.

Other factors also may be relevant in assessing a fiduciary's action. In *Leigh* v. *Engle*, 727 F.2d 113 (7th Cir. 1984), a case in which the corporate managers were fiduciaries of the plan and also invested 30 percent of the pension plan assets in three companies that the employer was attempting to take over, the court inquired into the extent and duration of the conflict between fiduciary and corporate interests. In *Donovan* v. *Mazzola*, 716 F.2d 1226 (9th Cir. 1983), a case in which the fiduciaries of a pension fund loaned pension assets to a welfare plan for which they were also the fiduciaries without any indendent inquiry into the loan, the court also looked at whether generally accepted procedures were used.

After considering advice received through the independent investigation, the fiduciary must make his or her own determination as to the prudence of a given course of action. The district court in *Bierwirth* emphasized that under trust law, a fiduciary "* * * is not justified * * * in relying wholly upon the advice of others, since it is his duty to exercise his own judgment in light of the in-

formation and advice he receives." (*Bierwirth*, supra, 538 F. Supp. at 474). that the fiduciary acted in good faith or that the fiduciary's decision turned out well is not a defense to a breach of fiduciary duty.

The *Bierwirth* decisions have been widely relied upon by other courts and have led to a uniform judicial standard of fiduciary responsibility. (See, e.g., *Norlin Corp.* v. *Rooney, Pace, Inc.*, 744 F.2d 255 (2d Cir. 1984); *Donovan* v. *Cunningham*, 716 F.2d 1455 (5th Cir. 1983); *Leigh* v. *Engle*, 727 F.2d 113 (7th Cir. 1984); *Donovan* v. *Mazzola*, 716 F.2d 1226 (9th Cir. 1983)).

C. APPLICATION OF THE FIDUCIARY STANDARDS UNDER THE EMPLOYEE PENSION PROTECTION ACT, AS AMENDED

The bill adopted by the Committee amends title I of ERISA to apply the fiduciary responsiblity standards in three circumstances:

(1) The distribution of residual assets to an employer pursuant to a single-employer pension plan termination;

(2) the purchase of annuities for participants and beneficiaries upon the termination of a single-employer pension plan; and

(3) the transfer of any excess pension assets from an ongoing single-employer pension plan to a retiree health benefits account maintained under section 401(h) of the Internal Revenue Code.

(1) The Distribution of Residual Assets to An Employer Upon Plan Termination

As has been previously discussed, for many years there has been widespread concern that the termination of defined benefit pension plans by employers seeking to recover plan assets has harmed the pension benefit needs and expectations of workers and retirees. When this issue initially arose, some experts argued that the decision to distribute residual pension assets was subject to the fiduciary responsibility standards. This position was rejected by the Department of Labor and the courts because other provisions of ERISA permitted reversions. The committee bill seeks to modify the provisions that currently permit reversions by applying the fudiciary standards to prevent situations in which ERISA's goal of protecting the pension benefits of participants and beneficiaries is undermined.

The committee bill amends current law to subject the distribution of residual plan assets to the fudiciary responsibility requirements of ERISA. The Committee believes that if determinations as to the allocation of residual assets are made in accordance with the fiduciary standards, then the promised pension benefits of workers and retirees will be protected.

As under current law, an employer may terminate an adequately funded pension plan at any time. If the plan does not permit an employer to recover residual assets and thus, no plan assets are reverting to the employer, then the bill does not apply. If an employer makes the decision to terminate a pension plan and recover residual plan assets and the plan so permits (in accordance with the requirement that the provision must have been in existence for five

years), then the fiduciary of the plan must determine whether the distribution is in the interests of the plan participants and beneficiaries. The fiduciary must make his or her decision A) solely in the interests of participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries; B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims; and C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.

The Committee did not subject the fiduciary's determination to the requirement that the fiduciary act in accordance with the terms of the plan. Because the employer determines the terms of the plan, in a reversion situation the fudiciary would be faced with a conflict between the other fiduciary responsibilities and the terms of the plan. The Committee bill seeks to avoid placing the fiduciary in a position where he or she cannot fulfill his or her fiduciary responsibilities and comply with the terms of the plan. The fiduciary should comply with the general fiduciary requirement that the terms of the plan be followed to the extent that the plan is consistent with the bill.

It is the intent of the Committee to subject the fiduciary's decision to permit an employer's recovery of residual assets to the well-accepted interpretation of the fiduciary standards. In addition, the Committee approves the practical interpretation of the fiduciary rules, as set forth in *Bierwirth*, that independent investigation and advice be considered as part of the fiduciary's determination. The Committee believes a fiduciary cannot fulfill his or her duties under section 404 of ERISA without consideration as to whether a distribution of residual assets to the employer is in the best interests of the plan's participants and beneficiaries. It is the intent of the Committee that the fiduciary protect the funded future retirement benefits promised to participants and beneficiaries as well as any reasonable expectations that retired participants may have in receiving cost-of-living adjustments or other benefit enhancements under the plan, (discussed below).

As under current law, the fiduciary retains ultimate responsibility for his or her decisions. Although he or she must consult with independent experts, he or she may not abdicate responsibility to others. In those situations where the fiduciary is also the employer, or has an obligation to or relationship with the employer, there is a necessarily a dual and conflicting loyalty in every employer reversion determination. The amount of assets that the fiduciary determines must be used to protect participants necessarily reduces the amount of assets that the employer may recover. Therefore, the fiduciary must demonstrate even more carefully that the decision was made "solely in the interest of participants and beneficiaries for the exclusive purpose of providing benefits" and was "prudent". As set out in the decisions of both the district and appellate courts in *Bierwirth*, where dual loyalties exist the independent investigation must be "intensive and scrupulous" and the fiduciary must "take every feasible precaution to free himself from any taint".

The fiduciary's determination as to whether or to what extent the employer may recover residual assets must take into consideration the overall pension transaction proposed by the employer, both the pension plan being terminated and the new plan being reestablished if there is one. It is the responsibility of the fiduciary to determine whether the overall pension transaction under which the employer seeks to recover residual assets is in the interests of participants and beneficiaries. If the employer is reestablishing an equal or superior pension plan that ensures sufficient assets are retained to pay the projected retirement benefits of active participants and protects retired participants reasonable expectation of benefit adjustments through the retention of additional assets or by providing benefit adjustments (as discussed below), then the fiduciary may determine that the distribution is in the best interests of participants and beneficiaries. If the employer reestablishes an inferior replacement plan, fails to reestablish a plan, does not retain funded future benefit obligations or does not protect retired participants' opportunity to receive benefit adjustments, then the fiduciary should not permit the distribution unless modifications are made to protect the interests of participants and beneficiaries. Although non-vested participants benefit by becoming vested upon termination, this is not sufficient to protect their funded projected benefits or to protect other participants. Stated simply, the fiduciary must ensure that the participants and beneficiaries—both active and retired—will retain the same benefits and expectations and thus will not be in a less secure position as a result of an employer's recovery of pension assets.

In making this determination, the Committee felt it necessary to require that the fiduciary separately consider certain key protections for participants and beneficiaries (described below). These considerations are not meant to be all-inclusive, but represent the well-established interests of participants and beneficiaries that have been delineated over the years. As is currently the practice under the fiduciary standards, the fiduciary should consider these factors in light of sound industry practices, past practices of the plan (including funding practices), when the plan was amended to permit a reversion, the reasonable expectations of participants and beneficiaries based upon the summary plan description, individual benefit statements, and other written or oral assurances to participants and any other considerations which may be relevant to the plan.

First, the fiduciary must consider the pension interests of the active participants. Defined benefit plans generally promise to pay a certain percentage of workers' final or average salary based upon years of service at retirement. The employer sets aside a prorated portion of the workers' projected compensation to meet this future obligation. Provided that the plan continues, workers who continue in service will receive their promised projected benefits. If the plan is terminated, those assets already set aside to provide workers' projected retirement benefits should be retained for the same purpose. Projected benefit obligations need not assume future service. Becuse most employers have set up some form of new pension plan for active participants, the fiduciary should ensure that all assets necessary to meet projected benefit obligations are either retained

in a follow-on pension plan or similarly set aside for participants who have not yet retired. The purchase of annuities that are retained under the replacement plan can be considered in the determination of whether projected retirement benefit obligations remain protected. If the employer purchases participating annuities in which the employer will receive future investment returns, the fiduciary should include the returns in the calculation of the amount of the employer's recovery of residual assets.

In reviewing the overall pension transaction, the fiduciary must consider what type of new pension plan is established and the degree to which the participants' future retirement benefit security is protected under that new pension plan. The more similar a new pension plan is to the terminated plan, the more likely that the interests of participants will remain protected and will not be jeopardized by a distribution of assets to an employer. Ideally, the employer will establish an identical defined benefit pension plan. To be considered identical, a new defined benefit plan must cover the same participants, give past service credit and retain at least the same benefits and rate of benefit accrual. In this case, if assets necessary to ensure all projected benefits funded to date are retained in an identical plan, the Committee believes the interests of the active workers are protected. The fiduciary may decide to determine the amount of assets needed to protect active participants' promised benefits based upon the full funding standard of 150 percent of benefit liabilities, provided this is no less than the funded future benefit obligations of the terminating plan. As noted previously, the Committee is aware that many employers and other trade associations have argued to Congress and the IRS that 150 percent of benefit liabilities is not always sufficient to meet projected obligations. The fiduciary must determine the appropriate asset level based upon the plan involved, its funding history, future benefit obligations, the likelihood that adequate funding will be continued in the future, and any other relevant information. At a minimum, all funded projected benefits should be retained in a reestablished plan. Fiduciaries with respect to flat benefit or non-salary related plans should retain sufficient assets to meet future obligations assuming reasonable future salary increases. Participants' promised retirement benefits must not be less secure, provided future service is performed, if the fiduciary is to determine that assets are being used for the exclusive purpose of providing benefits.

If a "lesser" plan is established, either a less generous defined benefit plan or a defined contribution plan, there is a need to retain a greater amount of pension assets in a new plan or in any other form that protects participants, such as an annuity. In these types of cases, the participants bear a far greater risk of future pension benefit loss. Compared to PBGC-insured defined benefit plans, many defined contribution plans, especially those tied to the employer's profitability, provide reduced benefit security. Also, investment risk in defined contribution plans generally falls on the plan participants. In addition, older workers who are near retirement age are more likely, because of the loss of pre-retirement inflation protection in defined benefit plans, to receive reduced benefits under a defined contribution plan. A lesser plan should retain

a significantly greater reserve of pension assets, more than that needed to meet projected benefits in an identical plan. The fiduciary also may purchase an annuity that provides reasonable inflation adjustments for active participants to protect projected benefits. A lesser plan should cover the same participants, provide past secrvice credit if applicable and provide a reasonable rate of benefit accrual (the top heavy rules are generally considered a reasonable standard for benefit accrual). The fiduciary should consider the likelihood that adequate contributions will be maintained in the future. The fiduciary should ensure that all active participants will receive their promised benefits under the reestablished plan.

In the least desirable situation, where no new pension plan is established, the fiduciary should weigh heavily the future benefit losses of participants. When no new plan is established, all of the participants experience a reduction in future retirement security. This reduction occurs despite the fact that employees may have made career decisions based on retirement benefit promises and expectations. The fiduciary should make every effort in these instances to allocate residual pension assets to protect the future retirement benefits promised to and reasonably expected by participants and beneficiaries. Fulfilling the future benefit expectations of active participants should be given priority before addressing the interests of retired participants (discussed further below). Although the benefits of all participants are jeopardized by a premature termination, the harm to active participants is particularly great as they do not even receive the retirement benefits that have been promised to them and that have already been funded. The fiduciary should ensure that all active participants receive their promised retirement benefits.

Second, the fiduciary must separately consider the interests of retired participants. Participants already in pay status, (*i.e.* receiving retirements benefits) receive their projected benefits. In an ongoing pension plan, retired participants may continue to receive adjustments to their pension benefits to reflect increases in the cost-of-living. Historically, when a pension plan earned higher than assumed rates of return, a portion of the investment gain often has been apportioned to retirees to adjust their benefits to increases in the cost-of-living. If the plan is terminated and all assets in excess of termination liability removed, retired participants lose the ability to receive benefit adjustments in two ways. First, if all residual assets are removed from a terminating or reestablished plan, there is no cushion of assets from which to provide benefit adjustments. Second, if annuity contracts are purchased for retirees, the retirees are no longer participants in a new plan and their benefits are frozen.

In determining whether the interests of retired participants are protected, the fiduciary must consider whether adequate cost-of-living adjustments or other benefit enhancements are provided. The Committee believes the fiduciary may protect the interests of retired participants in several ways. The fiduciary may purchase an annuity that provides reasonable future cost-of-living adjustments. The fiduciary also may protect the interests of retired participants by covering retirees under a new pension plan that contains a reasonable cushion of assets above projected benefit obliga-

tions that may be used for benefit adjustments, or by otherwise ensuring the existence of reasonable cost-of-living adjustments from those retirees. It is reasonable to base cost-of-living adjustments upon the average increase provided by medium and large size employers.

Third, in many cases, employer attempts to use pension plan assets for non-pension purposes are incident to a merger, takover or leveraged buy-out. In these cases, as well as other non-takeover related cases, the employer's financial condition may no longer be as secure. The employer may be burdened by a heavy amount of debt obligation, or may have experienced other changes that undermine its financial position and thereby its ability to continue to provide pension benefits. If the pension plan were ongoing, whatever future funding or investment gain may have accumulated serves to protect the retirement benefits of the active and retired participants. If the plan is terminated and all assets above termination liability given to the employer, the ability of the employer to continue providing promised benefits to active and retired participants may be jeopardized. The fiduciary must determine whether the financial stability of the employer has been significantly weakened and whether retirement benefits are jeopardized. If this is the case, then the fiduciary should retain an additional cushion of assets above projected benefits to protect the future retirement security of participants and beneficiaries.

Taken as a whole, the fiduciary must engage in considerable analysis to make his or her decision, but does have flexibility in determining that the interests of participants are protected. The alternatives described by the Committee are based upon previously considered alternatives that protect the retirement security of workers and retirees and are intended to provide guidance to the fiduciary.

The fiduciary may design differing protections provided the fiduciary determines that it is in the interests of participants and in conformity with his or her fiduciary responsibilities. The employer should make any needed modifications, including conforming plan amendments, prior to the termination and before the fiduciary completes his or her determination. A fiduciary may generally distribute residual assets to an employer if the participants and beneficiaries will receive their promised benefits and retain the same expectations before and after a plan termination. Similarly, a fiduciary may not distribute residual assets to an employer if the participants will not receive their promised benefits or retain the same expectations or are less secure in their retirement benefits because of the termination and employer reversion. In all cases, it is the responsibility of the fiduciary to permit the allocation of pension plan assets to an employer only if the retirement interests of participants and beneficiaries are securely protected.

(2) The Purchase of Annuities upon Plan Termination

Although the Committee believes that the purchase of annuities for participants in all circumstances, upon termination or by an ongoing plan, is currently subject to title I of ERISA, including the fiduciary responsibility requirements, the Committee believes that recent events warrant a reaffirmation of this requirement. As has

been previously stated, there is much concern currently about how annuities are purchased, which annuity carriers are chosen, and what benefit protection participants receive. It appears that many companies may not be fully cognizant of and in conformity with the fiduciary requirements of ERISA when purchasing annuities.

Therefore, it is the belief of the Committee that Congress must explicity clarify that the decision to purchase annuities is subject to the fiduciary standards. The fiduciary must make the decision to purchase an annuity "solely in the interests of participants and beneficiaries for the exclusive purpose of providing benefits" and do so in a manner that is "prudent" and "diversified so as to minimize the risk of loss." If the fiduciary is also the employer or has a financial or other relationship with the employer, the annuity decision-making process must be "intensive and scrupulous" and is subject to the highest standard of care under the law. The fiduciary must conduct as independent investigation and consider independent advice. The requirements of the *Bierwirth* decision are fully applicable to the purchase of annuities.

Reliance on an insurance rating along does not meet the independent investigation requirement and is not prudent. The fiduciary must independently consider the financial status of the annuity provider and its ability to provide long-term retirement benefits. If the annuity provider has a financial or other relationship with the employer or its controlled group, the fiduciary must make every effort to "avoid the appearance of any taint" and "act with the greatest degree of care" before permitting a transaction involving both parties. In cases where the parties have adverse interests, such as a reversion situation where the lower the cost of the annuity the greater the amount of a reversion to the employer, the fiduciary must engage in the most "intensive and scrupulous" investigation to ensure that the purchase is made solely in the interests of participants and beneficiaries for the exclusive purpose of providing benefits, is prudent under the circumstances, and is diversified so as to minimize the risk of loss. The fiduciary may even determine that such a transaction is a prohibited trasaction under ERISA. Finally, the fiduciary must take every precaution to guarantee that participants' benefits will be protected and paid out. In no event should a participant or beneficiary be at risk if an annuity provider fails to pay or defaults on its contractual pension benefit obligation. The Department of Labor should promptly begin to enforce the existing fiduciary responsibility requirements for the purchase of annuities.

(3) The Transfer of Excess Pension Assets to Certain Retiree Health Benefit Accounts

The Committee bill permits the transfer of excess pension assets of a single-employer plan to a retiree health benefit account maintained under section 401(h) of the Internal Revenue Code if the fiduciary determines that it is in the interests of the plan participants and beneficiaries. The fiduciary decision to transfer only arises if the pension plan contains "excess" pension assets. The Committee intends that a pension plan shall not be considered to contain excess assets for purposes of a transfer to a section 401(h) account unless it can no longer make contributions to the plan be-

cause it is above 150 percent of benefit liabilities as established in the full funding standard of section 412(c)(7) of the Internal Revenue Code. Pension plan assets may only be transferred to a retiree health benefits account that covers the identical group of retirees and must be transferred for each of the retirees covered by the pension plan.

The transfer of any pension assets to a retiree health benefits account is subject to the fiduciary responsibility requirements of ERISA as previously described. The fiduciary of the pension plan must make the decision to transfer any pension excess pension assets to a retiree health benefits account "solely in the interests of participants and beneficiaries for the exclusive purpose of providing benefits" and in a "prudent" manner. There must be an independent investigation and advice. If there is a conflict of interest, because the fiduciary is the employer or has a financial or other relationship to the employer, the investigation must be "intensive and scrupulous" and must be made with the greatest degree of care possible.

The fiduciary also must take certain factors into account in making this decision to ensure that the participants' interest in both the pension and the retiree health benefit plans is protected. First, the fiduciary must consider whether the pension benefits of the pension plan participants are adequately protected with respect to being vested in their pension benefits and other needed protections. No pension plan participant for whom assets have been contributed for the exclusive purpose of providing benefits should have his or her pension benefits or pension benefit security reduced by virtue of any trnasfer. Due consideration should be given to the retirees' need for a cost-of-living adjustment in their pension benefits as opposed to the transfer of pension plan assets to the retiree health benefits account. This determination should take into consideration the interests of early retirees who do not receive Medicare and the interests of retirees over age 65 who receive Medicare benefits.

Second, the fiduciary must consider whether the benefits of participants in the retiree health benefits plan are adequately protected. The identical group of pension plan retirees must benefit from the retiree health benefit transfer. The fiduciary should not consider this standard met if the level of retiree health benefits provided can be significantly reduced (or the retiree's cost significantly increased) under the plan. If retiree health benefits are currently structured under a proportional share arrangement between the employer and retirees, then the proportional share of the cost of retiree health benefits must remain the same for the employer and retirees both before and after a transfer.

Third, the fiduciary must consider whether the pension plan contains sufficient assets, above 150 percent of benefit liabilities, to ensure the ability of the plan to pay future benefit liabilities. This consideration addresses the problem of a pension plan that appears overfunded today, but may in reality have significant future liabilities for which substantial funding reserves are needed to provide future retirement benefits. Plans with a large percent of workers who are not near retirement age are likely to fall into this category. The Committee considers the interests of active participants

met if the pension plan retains all assets set aside to meet projected benefit obligations. The fiduciary should ensure that the funding needs of the pension plan are not jeopardized in any way by the transfer of pension plan assets to retiree health benefits.

D. PENSION PORTABILITY

Under current law, pension plan asset accumulations are increasingly being distributed at job termination and "cashed-out" in the form of lump sum distributions of an employee's entire pension plan account. This is especially so in the case of defined contribution plans, although even defined benefit plans are increasingly taking on the form of cash accumulation accounts to be distributed upon termination of employment.

In spite of the fact that under certain circumstances such cash distributions are subject to an additional 10 percent income tax, the means under current law to encourage such sums to be saved and invested for retirement purposes has proved inadequate. Studies demonstrate that the vast majority of pension plan lump sum distributions are used for current consumption and that few reinvest such amounts for retirement in individual retirement accounts or annuities. Additionally, current law prohibits a substantial percentage of the distributions made each year by private and governmental pension plans from being transferred, or "rolled-over," into retirement savings arrangements—namely, that portion of a distribution representing the return of an employee's own plan contributions made on an after-tax basis.

Currently, pension plan sponsors wishing to facilitate pension portability do not have a direct pension portability vehicle to which they can transfer employee pension accumulations. Pension plans cannot directly transfer amounts to individual retirement arrangements, nor can employee contributions, upon distribution, be reinvested in a tax-free retirement arrangement. These restrictions severely frustrate the ability of mobile employees, among them teachers and engineers, to take advantage of so-called buy-back provisions under which pension plans permit the repurchase of prior service. In addition, many companies have not established pension plans for their workers, often because costs and complexity of pension plan administration.

Generally, the Pension Portability amendment is designed to improve long-term retirement income security and address issues of competitiveness and worker mobility by enhancing pension portability, pension coverage, national savings, and capital formation.

The amendment amends ERISA to: (1) permit salary reduction contributions to simplified employee pensions (SEP's). Any size employer who does not currently have a pension plan can contribute to a SEP on behalf of the employees and each employee can match the amount of the employer's contribution on a salary reduction basis. (2) allow a separate-line-of-business test for SEP's. Employers and employees may contribute to a SEP on a separate-line-of-business basis to the extent that employees under all other lines of business are also covered under a pension plan. (3) Clarifying and simplifying ERISA for pension plans using IRAs as a funding vehicle. The ERISA funding rules would be made inapplicable to SEP's

and other IRA pension plans, and to eliminate the inconsistency of SEP rules under current law, ERISA would be conformed to vesting, participation, and distribution rules applicable to SEP's under the Internal Revenue Code.

Portability, national savings and capital formation would be enhanced because: (1) IRAs would serve as the portability vehicle for benefit transfers from qualified plans. Such benefit transfers could consist of both taxable and non-taxable benefits subject to appropriate reporting requirements. Separate accounting under an IRA of such amounts (including earnings thereon) would make such amounts eligible to be transferred back to a qualified plan. (2) Such IRA portability vehicles would be subject to the REA spousal protection rules as though they were defined contribution plans, not subject to the sec. 412 minimum funding rules (i.e., as if they were profit-sharing plans). By treating such a vehicle as a transferee plan under section 401(a)(11), the spouse or nonspouse beneficiary designation under a qualified plan would continue to be effective with respect to benefits so transferred. (3) Such IRA portability vehicles would have to make available at least the following core distribution forms (lump sum, joint and survivor and single life or quasi-annuity form, ten year installment period).

Transfer of nondeductible employee contributions to IRAs would permit all or a portion of an employee's benefit under a qualified plan (including the employee's investment in the contract) to be transferred directly upon the employee's separation from service (without current tax) from the plan to an IRA.

Qualified plans that allow for single sum distributions would have to provide employees who are eligible for a distribution under the plan with an option to transfer their benefits to an IRA in a direct trustee to trustee transfer. A plan would be allowed to provide this portability transfer option as the only option or as one of other distribution forms (including the Joint and Survivor form as under current law) and, if the plan provides, to permit employees to elect out of the portability transfer option and receive their benefits in cash. A plan must provide an explanation of the tax consequences of taking cash versus the tax-free portability transfer.

Portability of pensions in any amount would be encouraged by allowing plans, without obtaining employee or spousal consent, to transfer the pensions of terminating employees to portable pension plans. This is allowed, and the current $3,500 restriction would be eliminated, because the receiving IRA would be treated as a transferee plan that protects any spouse and provides a "core" set of distribution options.

Direct trustee-to-trustee transfers would always be allowable among IRAs, and as under current law, previous "rollovers" or transfers from qualified plans to IRAs, which are separately accounted for, may be transferred back to such qualified plans.

VI. Votes in Committee

Votes taken during Committee consideration of the legislation were as follows:

1. The Committee approved by voice vote an amendment in the nature of a substitute offered by Senators Metzenbaum and Kassebaum.

2. The Committee approved by voice vote an amendment offered by Senator Jeffords to improve the portability of the pension benefits of workers covered by employer-sponsored pension plans.

3. The Committee voted to adopt and report S. 685, as amended, by a roll call vote, 10–5, with one abstention.

YEAS	NAYS
Mr. Kennedy	Mr. Hatch
Mr. Pell	Mr. Durenberger
Mr. Metzenbaum	Mr. Coats
Mr. Dodd	Mr. Thurmond
Mr. Simon	Mr. Cochran
Mr. Harkin	
Mr. Adams	
Ms. Mikulski	
Mrs. Kassebaum	
Mr. Jeffords	

NOT VOTING

Mr. Matsunaga

VII. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, May 14, 1990.

Hon. Howard M. Metzenbaum,
U.S. Senate,
Washington, DC.

Dear Senator: The Congressional Budget Office has prepared the attached cost estimate for S. 685, the Employee Pension Protection Act, as ordered reported by the Senate Committee on Labor and Human Resources on February 28, 1990.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

Robert D. Reischauer,
Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 685.

2. Bill title: Employee Pension Protection Act.

3. Bill status: As ordered reported by the Committee on Labor and Human Resources on February 28, 1990.

4. Bill purpose: The purpose of this bill is to amend title I of the Employee Retirement Income Security Act of 1974 to provide that it is the responsibility of a fiduciary of a single-employer plan to ensure that the distribution of residual assets to an employer upon termination of such plan or the transfer of excess pension assets to a health account maintained by such plan is in the interest of plan participants.

5. Estimated changes to CBO baseline:

[By fiscal years, in billions of dollars]

	1991	1992	1993	1994	1995	5-year total
Estimated Revenues: S. 685 alone	−0.2	−0.2	−0.2	−0.2	−0.2	−0.9

Basis of estimate: This bill, as amended, would change the rules covering the termination of private sector pension plans and recovery of excess plan assets by the employer. Reversions of pension assets would be allowed only if the fiduciary, after the completion of an independent investigation, could determine that a reversion of assets would be in the interest of plan participants. In other words, the participants would be no worse off as a result of the recovery of excess plan assets by the employer. The bill would also permit the transfer of pension plan assets to retiree health benefits accounts. Once again, assets may be transferred only to the extent it would be in the interest of plan participants.

The provision in S. 685 requiring that asset reversions be determined to be in the interests of plan participants would lose revenue by reducing the amount of assets reverting to employers. Revenue would be lost because pension fund reversions are subject both to corporate income taxes and to a 15 percent excise tax. The Joint Committee on Taxation estimates that the reduced volume of asset reversions would reduce federal revenue by approximately $200 million per year from fiscal year 1991 through 1995.

The transfer of excess pension fund assets to pay for retiree health benefits would raise revenue, but only if it is accompanied by changes in the Internal Revenue Code (IRC) that also permit such transfers for qualified plans. This bill discusses the conforming changes but would not implement the changes. If these conforming changes are made in the IRC, the Joint Committee on Taxation estimates that allowing the transfer of excess pension fund assets to retiree health benefit plans together with the IRC changes would raise approximately $200 million per year for fiscal years 1991 through 1995. Therefore, revenues would remain unchanged as a result of the changes made in this bill and conforming changes to the IRS code.

In addition, of all plan participants involved in recent reversions, approximately 65 percent are changed from being covered by defined benefit plans to defined contribution plans or no replacement plans. Employers only pay premiums on employees covered by defined benefit plans. Therefore, if this bill reduces the number of pension plan reversions, more employees could remain in defined benefit plans and the Pension Benefit Guarantee Corporation (PBGC) could receive more premium income. The magnitude of this premium effect is not expected to be large.

Also, to the extent that pension plans would be better funded in the future if they are restricted from being terminated and excess funds being taken out of them, fewer plans may be placed under stewardship of the PBGC in the future. The long-term effect on

PBGC of modifying the behavior of pension plan terminations is unclear and cannot be quantified.

5. Estimated cost to State and local governments: None.

6. Estimate comparison: None.

7. Previous CBO estimate: None.

8. Estimate prepared by: Cathy Ellman, Budget Analysis Division, and Larry Ozanne, the Tax Analysis Division.

9. Estimate approved by: C.G. Nuckols for James L. Blum, Assistant Director for Budget Analysis.

VIII. Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the following statement of the regulatory impact of S. 685, as amended, is made:

A. ESTIMATED NUMBER OF INDIVIDUALS AND BUSINESSES REGULATED AND THEIR GROUPS OR CLASSIFICATIONS

S. 685, as amended, would amend the Employee Retirement Income Security Act of 1974 (ERISA) and would apply to all employees covered by and employers sponsoring defined benefit pension plans under that law. The U.S. Department of Labor estimates that appoximately 60 million workers and retirees are covered by one or more pension plans and that there are 230,000 employer-sponsored defined benefit plans.

B. ECONOMIC IMPACT ON THE INDIVIDUALS, CONSUMERS, AND BUSINESSES AFFECTED

The Committee believes that the bill will have a positive economic impact on affected individuals through the protection of their retirement benefits. The Committee believes the impact of the bill on businesses will be relatively minor.

C. IMPACT OF THE ACT ON PERSONAL PRIVACY

The Committee believes there will be no personal privacy implications from the bill.

D. ADDITIONAL PAPERWORK, TIME, AND COSTS

The Committee believes that the bill will require some additional paperwork, time and costs for pension plans but believes these effects are more than offset by the protection the bill affords to pension plan participants and beneficiaries.

IX. Section-by-Section Analaysis

Section 1. Short title

This Act may be cited as the Employee Pension Protection Act.

Section 101. Fiduciary duties to include determination of whether employer reversions or transfers to health accounts are in plan participants' interests

(a) In General.—Amends section 404 of the Employee Retirement Income Security Act to require that the:

(1) distribution of residual assets to an employer on plan termination,

(2) purchase of annuities on plan termination, or

(3) transfer of excess pension assets to a retiree health benefits account

not be made unless the plan fiduciary determines that such distribution, purchase or transfer is in the interests of the plan participants and beneficiaries.

The fiduciary shall make the determination in writing upon completion of an independent investigation and advice and on the basis of the fiduciary's responsibilities under section 404(a)(1) (A), (B) and (C).

In the case of a distribution of residual assets upon the termination of a plan, the fiduciary's determination shall include, but not be limited to, consideration of whether:

(1) an adequate portion of the residual assets are retained in one or more replacement plans in order to provide comparable future benefits to participants and beneficiaries,

(2) cost-of-living adjustments are provided to retirees receiving benefits, and

(3) the ability of the employer adequately to fund future pension benefits is stable.

In the case of a transfer of excess pension assets to a retiree health benefits account, the fiduciary's determination shall include, but not be limited to, consideration of whether:

(1) adequate vesting rights and other protections are adopted to protect the rights of pension plan participants and beneficiaries,

(2) retiree health benefits cannot be reduced,

(3) the assets remaining in the pension plan after the transfer are sufficient to pay future benefit liabilities and include a cushion of the excess assets to protect the funding status of the plan.

If an employer separates active and retired participants into separate plans, such plans shall be treated as one plan for purposes of the fiduciary's determination.

The fiduciary shall make the determination and notify the Pension Benefit Guaranty Corporation and participants at least 60 days before the date of termination or transfer.

(b) REMEDIES.—Section 409 of ERISA is amended by adding that any fiduciary who breaches his or her fiduciary duty under this provision shall be personally liable to the replacement plan, if such covers the participants of the terminated plan, or to the participants and beneficiaries of the terminated plan. The fiduciary shall be liable in an amount equal to the residual assets distributed, the annuities purchased or the amount transferred to a retiree health benefits account, whichever is applicable, with interest thereon, and such other equitable or legal relief as a court deems appropriate.

(c) EFFECTIVE DATE.—These amendments shall apply to any termination with respect to which the final distribution of assets has not begun before February 28, 1990.

Section 102. Qualifying employer security to include interest in publicly traded partnership.

Section 407(d)(5) is amended to include in the definition of a "qualifying employer security" an interest in a publicly traded partnership as defined in section 7704(b) of the Internal Revenue Code.

Section 201. Short title

Entitles this title the Pension Portability Act of 1989.

Section 202. Findings and declaration of policy

Summarizes the findings of Congress that employees' pension monies are increasingly being cashed out and used for consumption purposes and that it is desirable to create and encourage the portable pension accounts for the purpose of reversing this trend by preserving use of pension monies for retirement purposes.

Section 211. Definitions of simplified employee pension plan for purposes of title I of ERISA

Defines a simplified employee pension plan as a pension plan consisting of one or more employee pension plans within the meaning of Section 408(k)(1) of the Internal Revenue Code of 1986.

Section 212. Application of reporting and disclosure requirements to simplified employee pension plans.

Amends section 110 of ERISA to require the Secretary of Labor to issue regulations pertaining to simplified employee pension plans.

Section 213. Application of participation and vesting requirements to simplified employee pension plans

Amends Section 202(a)(1)(B) of ERISA, redesignating clause (ii) as clause (iii) and inserting a new clause (ii). This provides minimum participation requirements for simplified employee pension plans. No plan can condition participation by requiring that an employee have attained any age greater than 21 or have performed more than three years of service of the immediately preceding 5 years.

Section 203(a)(1) is also amended to state that a simplified employee pension plan meets minimum vesting standards, if an employer's rights in his accrued benefit derived from the employer's contribution are nonforfeitable.

Section 214. Distribution requirements for simplified employee pension plans

ERISA, part 2, subtitle B of title I is amended by redesignating 211 as 212, and by inserting a new section 211, entitled "Distributions of Accrued Benefit Under Simplified Employee Pension Plans".

Under section 211, each simplified employee pension plan or portable pension plan shall provide that:

(1) the distribution of the accrued benefit with respect to each participant will be only in a permitted retirement income form in accordance with this section,

(2) no distribution may be made without the consent of the participant (or the beneficiary in the case of the participant's death), and

(3) upon timely written application by the participant or beneficiary, in the case of the participant's death, the accrued benefit with respect to the participant will be distributed in accordance with such application.

Under section 211(b) distribution of the accrued benefit under a simplified employee pension plan is made in a permitted retirement income form if it is made:

(1) as a qualified joint and survivor annuity (within the meaning of section 205(d) or

(2) as any other joint life annuity (including a cash refund annuity) or

(3) as a single life annuity (including a refund annuity) or

(4) as any series of substantially equal periodic payments described in the Internal Revenue Code section 72(t)(2)(A)(iv).

Under section 211(c), in any case in which a plan participant elects a form of distribution under section 211(b), spousal consent is required, and the request needs to be made in writing.

Under Section 211(d), the administrator of a simplified employee pension plan shall, immediately before making a distribution pursuant to this section, provide to the individual who is to be a recipient of the distribution, a written explanation of whether the distribution may or may not be subject to an Internal Revenue Code penalty and/or income tax, as well as the condition of the applicable permitted retirement income forms and participant and spousal rights.

ERISA section 3, paragraph 8 is also amended so that in the case of a simplified employee pension plan, the term beneficiary means the spouse or any other person designated by the participant according to the terms of the plan. Requirements are also added so that the spouse must consent in writing if another beneficiary is named.

Section 215. Inapplicability of funding requirements to simplified employee pension plan

Amends ERISA section 301(a) so that ERISA's funding rules do not apply to simplified employee pensions.

Section 216. Effective date

The amendments shall apply with respect to taxable years beginning after December 31, 1992.

Section 221. Utilization of simplified employee pensions as portable pension plans

Amends ERISA section 3 to define a portable pension plan as a pension plan consisting of one or more simplified employee pension plans, individual retirement accounts or individual retirement annunities. These plans must meet the requirements of section 408(k) of the Internal Revenue Code with respect to amounts contributed by employers on behalf of employees.

Section 222. Safe harbor for portable pension plans under ERISA, Title I

ERISA, part 4, subtitle (B) of title I is amended by redesignating section 414 as section 415 and inserting a new section 414. Section 414(a) clarifies that portable pension plans should be treated as pension plans under ERISA section 404(c).

Section 223. Requirements relating to distribution from pension plans constituting transfers to portable pension plans

ERISA section 203(e) is amended by redesignating paragraphs (2) and (3) as paragraphs (4) and (5), respectively and inserting a new paragraph (2) provides that direct transfer to a portable pension plan from any other pension plan of the entire nonforfeitable benefits of a participant under such other pension shall not be treated as a distribution in violation of paragraph (1), to the extent such transfer meets the requirements of section 208(b).

A new section 2(B) provides that for purposes of subparagraph (2)(A), a transfer of less than the entire nonforfeitable benefit shall be treated as a transfer of the entire nonforfeitable benefit if the excluded portion of the benefit consists solely of distributed employee contributions which are not includible in gross income for purposes of the Internal Revenue Code of 1986 by reason of the distribution.

A new section 3(A) is added stating that any distribution of the entire nonforfeitable benefit of a participant, beneficiary, or alternate payee as would be subject to additional tax under section 72(t) of the Internal Revenue Code of 1986, if such benefit were distributed other than in a direct transfer to a portable pension plan, shall be treated as a distribution in violation of paragraph (1) unless it is made as such a direct transfer to a portable pension plan, irrespective of any consent to a distribution made in any other manner.

Section 3(B) states that in any case in which a portable pension plan does not accept deposits of less than the dollar amount specified in section 408(K)(2)(C) of the Internal Revenue Code of 1986, the entire nonforfeitable benefit of each participant under any other pension plan is directly transferred to such portable pension plan.

Section 224. Effective date

In general the amendments apply with respect to taxable years under the Internal Revenue Code of 1986 beginning after December 31, 1992.

In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before the date of the enactment of this Act, the amendments made by the third section of this subchapter shall not apply to employees covered by any such agreement in plan years beginning before the earlier of January 1, 1993 or the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof on or after the date of the enactment of this Act), or January 1, 1994.

Section 225. Coordination with applicable Internal Revenue Code provisions

This section provides that this title and the amendments made thereby shall be effective as though enacted as amendments to sections 401, 402, 403, and 408 of the Internal Revenue Code of 1986.

In addition, the provisions of this chapter and the amendments made thereby shall be effective to the extent that compliance with such amendments does not rquire failure to comply with any applicable provision of the Internal Revenue Code of 1986 or subject the employer or employee to any excise tax contained therein.

X. MINORITY VIEWS OF MESSRS. HATCH, THURMOND, COCHRAN, COATS, DURENBERGER, AND JEFFORDS

I. Overview

The Committee's views have taken many thousands of words to say what could have been said in just eight: this bill bans reversions and retiree health transfers. It does so, first, by making several decisions subject to fiduciary standards under ERISA, including that such decisions be made "for the exclusive purpose of providing benefits to participants and beneficiaries." These decisions fall in three categories: (1) the distribution surplus defined benefit plan assets following a plan termination; (2) the purchase annuities upon termination; and (3) the transfer of excess pension assets to fund retiree health benefits. Second, it details the fiduciary's obligation in this regard based on unprecedented standards and preconditions, effectively mandating cost-of-living benefits for retirees and huge benefit increases beyond the amounts accrued by active participants as of the date of plan termination. Finally, it makes the fiduciary personally liable if his or her actions in this regard are subsequently challenged.

All of these requirements dictate that when an overfunded defined benefit plan terminates, excess plan assets will be distributed between active plan participants and retirees. The bottom line, however, is that the standards and requirements in this bill will undoubtedly preclude an employer from recouping any portion of these funds. This is in marked contrast to current law which permits an employer to recoup post-tax excess assets at termination.

The principal issue, therefore, is whether such a ban on employer reversions will enhance or jeopardize the benefit security of millions of American workers. Our concern is that the latter result is far more likely because precluding employers from ever recouping excess plan assets will discourage the formation and expansion of defined benefit plans and seriously deter current plan sponsors from soundly funding existing plans. As the Administration has stated in expressing its strong opposition to this bill, "(t)he result will be less benefit security for participants and greater risks for the Pension Benefit Guaranty Corporation." (Letter from Secretary Dole to the Senate Labor and Human Resources Committee, May 2, 1990).

Further, our concern is not confined to the deleterious results that such a ban will have on the establishment, maintenance, and funding of defined benefit plans. In addition, the bill and Committee Report are extremely troubling in that they create new and unprecedented obligations with respect to the provision and funding of benefits based on vague and unjustifiable notions regarding the nature of the benefit promise and the expectations of employees.

For the reasons outlined below, we find both the likely result of this bill and the means by which it achieves that result objectionable.

II. Analysis and Impact

Our starting point should be the value of defined benefit plans to participants, the nature of these plans, and the impact that this bill will have on their continuation and maintenance. Defined benefit plans represent the cornerstone of retirement security for American workers. Unlike defined contribution plans, in defined benefit plans the employer takes the risk of asset performance, and this risk is further backed by the Pension Benefit Guaranty Corporation, the government agency that insures pensions. At the same time, however, current law permits the employer to recoup excess assets that may accumulate under the plan. The defined benefit plan is by far the preferable package in terms of assured adequate employee retirement income security.

Unfortunately there has been a trend away from defined benefit plans in recent years. Defined contribution plans are very attractive as a means of controlling corporate benefit costs. Because contributions are generally based on a percentage of payroll, annual costs are always known. Administrative costs are much lower, since complicated actuarial valuations are unnecessary. Complex and burdensome annuity rules may also be avoided and recordkeeping is less protracted when an account balance is routinely cased out at separation from service. Most importantly, under defined contribution plans, the employer's obligation to the plan ends with its contribution. Thus, in marked contrast to defined benefit plans, it is the employee, rather than the employer, that must bear the risk of investment performance in a defined contribution plan.

Unquestionably, the employee bears a risk with respect to both types of plans. Thus, under a defined benefit plan the employer may decide to terminate the plan and participants will not continue to accrue benefits. The employer may reduce the benefit provided under the plan because it can no longer afford the level of benefits being provided thereunder. The participant may not remain employed, or the employer may not remain in business. These are the risks inherent in a private, voluntary system; these are the risks that Congress has again and again decided are preferable to a national public retirement system or a mandated employer provided system.

The Committee bill would change the very nature of defined benefit plans to give participants all of the upside potential of investment performance and none of the downside risk. In our view, therefore, it will undoubtedly cause employers to even more drastically turn away from defined benefit plans and toward defined contribution plans or no plans at all, and lead those employers who stay in the system to fund their plans only to the minimum required by law.

Under the bill, an employer would be at risk not only for the estimated funding needs of the plan, but also for a higher benefit based on the level of assets in the plan at termination. The logical response of plan sponsors, we believe, might well be to insist that

funding assumptions be far less conservative, so as to avoid a ballooning of benefits at termination. If the plan were underfunded at termination, the employer could always agree to make the plan sufficient if it could afford to do so. If it couldn't, the risk would once again fall on the government's insurance system, further endangering the financial viability of that program. In recent years, we have seen employers and even industries go from boom years to bankruptcy. This bill invites employers to gamble that at plan termination they will be able to fully fund their plan, because it would truly constitute a waste of corporate assets to fund the plan properly and adequately now, only to end up being penalized for doing so at termination. An employer's reward for responsible funding under this bill is unexpected and vastly enlarged benefit obligations.

What this bill does, specifically, is to apply the fiduciary standards under section 404 of ERISA to the termination/reversion decision. (As noted, this is in contrast to current law under which terminations are considered a settlor function, permitting employers to recoup excess pension plan assets at termination at a level above that needed to pay benefit liabilities accrued to date.) Application of such standards would require that a fiduciary ensure that the distribution of assets upon plan termination is "solely in the interest of plan participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries." But the bill and Committee Report go even further in terms of the guidance and requirements they set forth in order for the fiduciary to comply with ERISA standards. They do so by defining compliance with the fiduciary standard in terms of a novel, unprecedented and unjustified concept of the benefit promises and employee expectations that an employer must fulfill.

The Committee Report suggests that the benefits that must be protected on plan termination are not the "accrued benefits", as that term has been defined under the Code since the inception of ERISA. Rather, it relies on some vague and subjective notion of a greater "expectation" or "promise" that involves future service employers may never receive and salary increases employers may never give in the case of active employees, and cost-of-living increases in the case of retirees, regardless of whether such increases had ever been provided or promised under a plan. To the extent the proponents find support for the legitimacy of such "expectations" under the decided cases, their reliance is misplaced. Rather, the position adopted by the Committee results not in the protection of any legitimate benefit expectations, but in a windfall to plan participants. See *Washington-Baltimore Newspaper Guild, Local 35 v. the Washington Star Company,* 555 F. Supp. 257, 260 (D.D.C. 1983), aff'd, 729 F.2d 863 D.C. Cir. 1984).

In the leading decision in this area, the Court of Appeals for the Eleventh Circuit, sitting en banc, unanimously put to rest any notion that an employer is responsible for benefit expectations. The Eleventh Circuit wrote:

> No case has ever held that, when a defined benefit plan terminates, an employer is required to pay an employee retirement benefits based on future years of service not

> yet worked. On the other hand, several cases hold that accruals cease when a plan terminates. See *In Re Pension Plan for Employees of Broadway Maintenance*, 707 F.2d 647 (2d Cir. 1983); *In Re Syntex Fabrics, Inc.* v. *Pension Plan*, 698 F.2d 199 (3d Cir. 1983); *PBGC* v. *Heppenstall*, 633 F.2d 293 (3d Cir. 1980).

Blessitt v. *Retirement Plan for Employees of Dixie Engine*, 848 F.2d 1164, 1172 (11th Cir. 1988). *Blessitt* holds conclusively that as of the date of plan termination, "employees could no longer reasonably rely on their continued employment endowing them with further acrrual of benefits." *Id.* at 1173. Thus, although the Committee Report repeatedly points to the "broken promise" of a terminated plan and the "unfulfilled expectations" of the participants, as the *Blessitt* court noted, "[i]t is clear under *Broadway Maintenance*, *Syntex*, and *Heppenstall* that all reasonable expectations of benefits accrual cease when the plan terminates, regardless of whether the participant continues to work for the plan sponsor. *Id.* at 1173. Cf. *Dhayer* v. *Weirton Steel Div. of National Steel Corp.*, 571 F. Supp. 316, 327 (N.D., W. Va.), aff'd, *Sutton* v. *Weirton Steel Div. of National Steel Corp.*, 724 F. 2d 406 (4th Cir., 1983), cert denied 467 U.S. 1205 (1984) (stating that the plaintiffs' search for security in terms of pension benefits to be earned (to become vested or accrued) at some point in the future is something that is not contemplated by ERISA (beyond insuring certain minimal benefits protected by the Pension Benefit Guaranty Corporation)).

The bill sponsors seek to cloak this bill in the mantle of protecting benefit expectations. But just how far will this notion of promises and expectations take us? The bill requires plan sponsors with overfunded plans to provide, at plan termination, the level of benefits that a participant would have earned had the plan stayed in existence until the participant had worked an entire career at an "expected" salary scale. Is this fictional promise made to everyone? If a participant is fired prior to retirement and has participated in an overfunded plan, should he or she too get this "promised" benefit, as if he or she had gone on working? After all, the employer funded the plan as if he or she would stay until retirement. What exactly is this promise that the majority sees so clearly?

Further, we are concerned that the requirement that the fiduciary ensure the fulfillment of "any reasonable expectations that retired participants may have in receiving cost-of-living adjustments (COLA's)" represents a backdoor effort to mandate COLA's for retirees. In this regard, we find it particularly ironic and objectionable that such benefits are mandated as a penalty for only plan sponsors who have responsibly funded their plans and wisely invested their plan assets.

Most importantly, we see no basis for what appears to be an inherent assumption by the majority that a reasonable expectation for COLA's exists on the part of the retirees, who have received 100 percent of their accrued benefit! Is this due to the existence of excess assets? Studies by the Department of Labor and Hewitt Associates have proven there to be no correlation between pension plan funding and the provision of COLA's. In fact, COLA's have historically been given during periods of high inflation. Since 1982,

no more than 15% of all companies provided a COLA in a given year.

In sum, we suggest that the nature of the "promise" and the subjective expectations upon which the majority relies can only lead to ambiguous requirements, inconsistent results, extensive and costly litigation, and, in this case, a stampede away from the kind of plans that we would all undoubtedly like to preserve.

This bill also subjects the decision to transfer excess pension assets to retiree health accounts to ERISA's fiduciary standards. Once again, the Committee Report defines these standards in a way which will effectively preclude such transfers. For example, the Report requires that fiduciaries not only consider whether plan participants are vested in their pension benefits, but also whether retirees might "need" COLA's as opposed to retiree health transfers. Given these and other requirements and guidelines set forth in the Report it is difficult to imagine a circumstance in which a retiree health transfer would be likely to occur.

Finally, this bill applies retroactively to terminations with respect to which the distribution of assets had not begun before February 28, 1990. Leaving aside the legal questions raised by this provision, we view it as fundamentally unfair in these circumstances to retroactively subject fiduciaries and employers to new and radically different standards.

III. Conclusion

Based on the foregoing, we oppose this legislation, concerned that it will do more to jeopardize than to enhance the retirement security of millions of American workers.

Orrin G. Hatch.
Strom Thurmond.
Thad Cochran.
Dan Coats.
Dave Durenberger.
Jim Jeffords.

ADDITIONAL VIEWS OF MR. JEFFORDS

Although I voted in favor of reporting S. 685, I agree with the views of the minority pertaining to the asset reversions section of this bill. S. 685 will have an adverse impact on the defined benefits pension plan system.

I want to underscore the differences between defined benefit and defined contribution plans. While in defined contribution plans, specific cash contributions are the deferred wages, this is not true of defined benefit plans. In a defined benefit plan, the promised benefit is the deferred wage, not the pension plan contributions. The contributions are in the plan as security for payment. Assets in the trust are the means with which this promise is fulfilled, but it is the promised benefit that the Pension Benefit Guaranty Corporation's guarantee is based upon—regardless of the pension plan contribution amounts.

Certainly, this is a fact fully appreciated by the employees of Wheeling-Pittsburgh Steel Co. and others who have had their pension plans terminate with assets insufficient to maintain benefit promises. We have seen defined benefit pension plans terminate with deficits from 500 million to 2.3 billion dollars. But always, most of these employees' promised benefits were protected by the PBGC even if there were not enough contributions in the pension plan to pay for these promises. This is what makes defined benefit plans superior to other kinds of pensions—you can depend on receiving a specific benefit. Most federal plans are defined benefit plans, a certain percentage of salary is guaranteed, which when paid out may far exceed the amounts contributed.

Unfortunately, due to the many changes Congress has made, the future of defined benefit plans to questionable. At the very time when we ought to be doing everything to encourage the creation of these plans, this bill will instead severely limit growth in the system. Most defined benefit plans will fund to the minimum required by the law. The underfunding of defined benefit pension plans is already a problem. On May 7, the Pension Benefit Guaranty Corporation released names of the fifty companies with the largest underfunded pension plans. In total, these firms' plans are 14 billion dollars underfunded for benefits guaranteed by the PBGC. If the asset reversions provisions of S. 685 become law, I expect this problem will dramatically worsen.

While I share proponents' concerns over problems resulting from terminations/reversions, I believe a less drastic solution, balancing the interest of employees and employer, is in order.

Under current law, a defined benefit pension plan is forced to terminate in order to obtain excess pension assets. The problems that result from pension plan terminations are vividly highlighted by the recent termination of the Coleman Co. pension plan in Kansas. Even though the plan is continuing and there was no cut-

back in benefits, the company is forced to purchase annuities for all obligations to date and set up a new, successor plan for all future obligations. This just doesn't make sense. Not only must the company go through the charade of a plan termination, but no cushion of money is required to be placed in the new plan as a protection against inflation.

Alternatively, I would propose permitting withdrawals of excess pension assets, without requiring that a pension plan terminate. I would also require that an additional cushion of money be left in the existing plan to hedge against inflation. Withdrawals would be permitted to enable funding for retiree health plans, dependent care assistance, training, and for other employee benefit purposes. I would also permit withdrawals to fund research and development as well as the modernization of domestic plants. If an employer decides to get out of the system and terminate, the employer should be required to use excess pension monies to provide employee benefits for any nondiscriminatory group of employees he chooses.

This solution to the termination/reversions problem is to my mind a compromise that will not threaten the integrity of the private pension system or the retirement security of the more than 55 million Americans currently participating in employer sponsored pension plans. It would enable continued commitment to defined benefit pension plans. This will become more fully appreciated as our nation's demographics change and the baby boom generation prepares to retire.

JIM JEFFORDS.

XI. Changes in Existing Law

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a print of the statute or the part or section thereof to be amended or replaed (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Employee Retirement Income Security Act of 1974

* * * * * * *

DEFINITIONS

SEC. 3. For purposes of this title:

(1) * * *

* * * * * * *

(8) [The term] *(A) Subject to subparagraph (B), the term* "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

(B)(i) In the case of a simplified employee pension plan, the term "beneficiary," when used in connection with a participant, means—

(I) the spouse of the participant, or

(II) if the spousal consent requirements of clause (ii) are met, any other person designated by the participant, or by the terms of the plan, who is or may become eligible under the plan to receive some or all of the accrued benefit.

(ii) The spousal consent requirements of this clause are met if—

(I) the spouse of the participant consents in writing to the designation under subparagraph (A)(ii) of the other person referred to in subparagraph (A)(ii) as a beneficiary, (II) such designation is of a beneficiary which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (III) the spouse's consent acknowledges the effect of such consent and is witnessed by a representative of the plan or a notary public, or

(II) it is established to the satisfaction of a representative of the plan that the consent required under subclause (I) may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as may be prescribed in regulations referred to in section 205(c)(2)(B).

MERGERS AND CONSOLIDATIONS OF PLANS OR TRANSFERS OF PLAN ASSETS

SEC. 208. *(a)* A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after the date of the enactment of this Act, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). This paragraph shall apply in the case of multiemployer plan only to the extent determined by the Pension Benefit Guaranty Corporation.

(b) A direct transfer to a portable pension plan from any other pension plan of the present value (determined as provided in section 203(e)(4)) of the entire nonforfeitable benefit of a participant under such other pension plan shall not be treated as a transfer in violation of subsetion (a) if and only if the requirements of paragraph (1) or (2) are met with respect to the transfer, as follows:

(1) The requirements of this paragraph are met with respect to the transfer if—

(A) the entire nonforfeitable benefit is, under regulations of the Secretary of the Treasury, distributable under such other pension plan in conformity with the requirements of this part, and

(B) in any case in which such present value is in exess of $3,500—

(i) the participant (or alternate payee (within the meaning of section 205(d)(3)(K))) consents in writing to the transfer, and

(ii) in any case in which section 205 applies to the participant under section 205(b)(1)(C), the participant's spouse consents in writing to the transfer.

(2) The requirements of this paragraph are met with respect to the transfer it—

(A) the amount transferred with respect to the participant and any investment gains and losses under such portable pension plan with respect to the amount transferred are separately accounted for under such portable pension plan,

(B) the rules set forth in such portable pension plan with respect to benefits attributable to amounts described in subparagraph (A) which provide for optional forms of benefits and otherwise govern the distribution of benefits are identical to the rules set forth in such other pension plan which provide for optional forms of benefits and otherwise govern the distribution of benefits, and

(C) any election in effect under such other pension plan as provided in the rules described in subparagraph (B) shall remain in effect under such portable pension plan as provided in such rules.

PLANS MAINTAINED BY MORE THAN ONE EMPLOYER, PREDECESSOR PLANS, AND EMPLOYER GROUPS

SEC. 210. (a) * * *

* * * * * * *

DISTRIBUTIONS OF ACCRUED BENEFIT UNDER SIMPLIFIED EMPLOYEE PENSION PLANS

SEC. 211. (a) IN GENERAL.—Each simplified employee pension plan or portable pension plan shall provide that—

(1) the distribution of the accrued benefit with respect to each participant will be only in a permitted retirement income form in accordance with this section,

(2) no distribution may be made without the consent of the participant (or the beneficiary in the case of the participant's death), and

(3) upon timely written application by the participant (or the beneficiary in the case of the participant's death) in accordance with the terms of the plan—

(A) requesting distribution of the accrued benefit,

(B) designating for such distribution a standard retirement income form provided under the plan or another form elected in accordance with subsection (c)(2), and

(C) designating the date on which such distribution is to commence,

the accrued benefit with respect to the participant will be distributed in accordance with such application.

(b) DISTRIBUTIONS IN STANDARD RETIREMENT INCOME FORM.—Except as otherwise provided in subsection (c), distribution of the accrued benefit under a simplified employee pension plan is made in a permitted retirement income form if it is made in one or more of the standard retirement income forms. The standard retirement income forms are as follows:

(1) A qualified joint and survivor annuity (within the meaning of section 205(d)).

(2) Any other joint life annuity (including a cash refund annuity).

(3) A single life annuity (including a refund annuity).

(4) Any series of substantially equal periodic payments described in section 72(t)(2)(A)(iv) of the Internal Revenue Code of 1986 other than a form described in paragraph (1), (2), or (3).

(c) ELECTIONS WITH RESPECT TO FORMS OF DISTRIBUTION.—

(1) RULE WHERE PLAN ALLOWS FORM OTHER THAN DISTRIBUTION OVER LIFE EXPECTANCY.—In any case in which a simplified employee pension plan allows the form described in paragraph (1), (2), or (3) of subsection (b) as a means of distribution of the accrued benefit with respect to a participant, the plan does not provide a permitted retirement income form unless the plan provides that the standard retirement income form described in paragraph (1) of subsection (b) (or paragraph (3) of subsection (b), in the case of a participant with no spouse) is the only means of distribution under the plan except to the extent another standard retirement income form described in subsec-

tion (b) is elected by the participant in accordance with the spousal consent requirements of paragraph (3) of this subsection.

(2) ELECTION OF FORMS OTHER THAN STANDARD RETIREMENT INCOME FORMS.—The distribution of the accrued benefit under a simplified employee pension plan in other than a standard retirement income form described in subsection (b) shall not be treated as made in other than a permitted retirement income form to the extent that—

(A) the distribution in such other form is expressly elected in writing in accordance with the terms of the plan, and

(B) the spousal consent requirements of paragraph (3) are met.

(3) SPOUSAL CONSENT REQUIREMENTS.—The spousal consent requirements of this paragraph are met if—

(A)(i) the spouse of the participant consents in writing to the election under paragraph (1) or (2), (ii) such elected form may not be changed without spousal consent (or the consent of the spouse expressly permits changes in the form without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such consent and is witnessed by a representative of the plan or a notary public, or

(B) it is established to the satisfaction of a representative of the plan that the consent required under subparagraph (A) may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as may be prescribed in regulations referred to in section 205(c)(2)B).

Any consent by a spouse (or establishment that the consent of a spouse may not be obtained) under the preceding sentence shall be effective only with respect to such spouse.

(d) WRITTEN EXPLANATION TO RECIPIENTS OF DISTRIBUTIONS.—The administrator of a simplified employee pension plan shall, immediately before making a distribution pursuant to this section, provide to the individual who is to be the recipient of the distribution a written explanation of—

(1) the provisions under which the distribution may or may not be subject to tax or penalty under the Internal Revenue Code of 1986, and

(2) the terms and conditions of the applicable permitted retirement income form, the participant's right to make an election under subsection (c)(2), and the rights of the participant's spouse under subsection (c)(3).

EFFECTIVE DATES

[SEC. 211.] *SEC. 212.* (a) * * *

* * * * * * *

10 PERCENT LIMITATION WITH RESPECT TO ACQUISITION AND HOLDING OF EMPLOYER SECURITIES AND EMPLOYER REAL PROPERTY BY CERTAIN PLANS

SEC. 407. (a) * * *

* * * * * * *

(d) For purposes of this section—

(1) * * *

* * * * * * *

[(5) The term "qualifying employer security" means an employer security which is stock or a marketable obligation (as defined in subsection (e)).]

(5) The term "qualifying employer security" means an employer security which is—

(A) Stock,

(B) a marketable obligation (as defined in subsection (e)), or

(C) an interest in a publicly traded partnership (as defined in section 7704(b) of the Internal Revenue Code of 1986), but only if such partnership is an existing partnership as defined in section 10211(c)(2)(A) of the Revenue Act of 1987 (Public Law 100-203), as amended.

After December 17, 1987, in the case of a plan other than an eligible individual account plan, an employer security described in subparagraph (A) or (C) shall be considered a qualifying employer security only if such employer security satisfied the requirements of subsection (f)(1).

* * * * * * *

LIMITATION ON ACTIONS

SEC. 413. (a) * * *

* * * * * * *

SPECIAL RULES FOR PORTABLE PENSION PLANS

SEC. 414. (a) IN GENERAL.—In the case of any portable pension plan which meets the requirements of subsection (b)—

(1) CLARIFICATION OF FIDUCIARY REQUIREMENTS.—Such pension plan shall be treated as a pension plan referred to in section 404(c).

(2) ACTIONS TAKEN BASED ON MISINFORMATION NOT GROUNDS FOR FAILURE TO MEET REQUIREMENTS OF TITLE.—Such pension plan shall not be treated as a plan failing to meet any requirement of this title solely by reason of any act or failure to act in the administration of such plan in good faith reliance on any information provided by an employer, participant, or beneficiary with respect to such plan which constitutes a misrepresentation or mistake of fact.

(3) RESPONSIBILITIES OF PLAN SPONSOR, ADMINISTRATOR, AND EMPLOYER.—

(A) PLAN SPONSOR.—Except with respect to duties enforceable under subparagraph (C), any reference in the other pro-

visions of this title to the 'plan sponsor' shall be construed to be a reference (as applicable) to the custodian of the custodial account referred to in section 403(b)(3)(ii) or the insurance company referred to in paragraph (1) or (2) of section 403(b).

(B) ADMINISTRATOR.—Any reference in the other provisions of this title to the "administrator" shall be construed to be a reference to the custodian or insurance company referred to in subparagraph (A), except that, if such custodian or insurance company designates any other person to serve as administrator (within the meaning of section 3(16)(A)(i)), such reference shall be construed to be a reference to such other person.

(C) EMPLOYEE'S RIGHT OF ACTION AGAINST EMPLOYER PRESERVED.—The preceding provisions of this paragraph shall not be construed to preclude an employee's right of action under section 502 against an employer—

(i) to enjoin compliance by the employer with any obligations relating to contributions made pursuant to section 408 of the Internal Revenue Code of 1986, or

(ii) to enforce such requirements of this title relating to employers as the Secretary determines appropriate by regulation pursuant to subsection (c)(1).

(b) REQUIREMENTS.—A portable pension plan meets the requirements of this subsection if such plan meets the requirements of the following paragraphs:

(1) CONFORMANCE WITH REQUIREMENTS AS APPLICABLE UNDER REGULATIONS.—A portable pension plan meets the requirements of this paragraph if such plan meets the requirements of section 404(c), subject to such regulations (consistent with this section) as may be prescribed by the Secretary under section 404(c) for the purpose of specifically taking into account attributes peculiar to portable pension plans.

(2) DESIGNATION OF FIDUCIARY.—A portable pension plan meets the requirements of this paragraph if such plan designates in writing the plan sponsor (as defined in subsection (a)(3)(A)) as the named fiduciary referred to in the second sentence of section 402(a)(1).

(3) INVESTMENT OPTIONS.—

(A) IN GENERAL.—A portable pension plan meets the requirements of this paragraph if the plan provides, as at least one means of investment of contributions (including accumulated earnings), investment (in individual or pooled arrangements) in United States Government securities or securities which are insured by the United States or any agency thereof (which may include temporary investments in other forms of insubstantial amounts).

(B) DEFAULT OPTION FOR CERTAIN TRANSFERS.—A portable pension plan does not meet the requirements of this paragraph unless the plan provides that any amount transferred to the plan as described in section 3(42)(B)(ii) may, as one of the means of investment under the plan, be invested or reinvested under the plan only in securities described in subparagraph (A). The requirements of the preceding sen-

tence shall not apply if the participant (or the participant's beneficiary in the event of the participant's death) elects otherwise in accordance with the terms of the plan and applicable regulations under section 404(c).

(c) REGULATIONS.—

(1) IN GENERAL.—The Secretary shall prescribe such regulations as are necessary to carry out the provisions of this section.

(2) PROTOTYPE PORTABLE PENSION PLANS.—The Secretary and the Secretary of the Treasury shall jointly prescribe by regulation one or more prototype portable pension plans which would, upon adoption by any plan sponsor, constitute a portable pension plan meeting the requirements of subsection (b).

EFFECTIVE DATE

SEC. [414.] *415.* (a)

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SEC. 1002. DEFINITIONS.

For purposes of this subchapter:

(1) * * *

* * * * * * *

(41) The term "simplified employee pension plan" means a pension plan consisting of one or more simplified employee pensions within the meaning of section 408(k)(1) of the Internal Revenue Code of 1986.

(42)(A) The term "portable pension plan" menas a pension plan consisting of one or more simplified employee pensions, individual retirement accounts, or individual retirement annuities (within the meaning of section 408 of the Internal Revenue Code of 1986) which—

(i) meets the requirements of section 408(k) of the Internal Revenue Code of 1986 with respect to amounts contributed by employers on behalf of employees in the manner provided in such section 408(k), and

(ii) meets the portability requirements of subparagraph (B).

(B) A pension plan meets the portability requirements of this subparagraph if the plan provides—

(i) that, pursuant to a written election by any individual who has an accrued benefit under the plan (or the individual's beneficiary in the event of the individual's death) and spousal consent as provided in section 211(c)(3)—

(I) all or part of the accrued benefit with respect to such individual may be distributed in the form of a direct transfer from the plan to a portable pension plan, and

(II) all or part of such accrued benefit, to the extent it represents amounts separately accounted for under the plan as rollover amounts (as described in section 402(a)(5) of the Internal Revenue Code of 1986), rollover contributions (as described in section 408(d)(3)(A)(ii) of such Code), or direct plan transfers (in the form of plan distributions described in paragraph (2) or (3) of section 203(e) or paragraph (3) or (4) of section 205(g) or any other direct transfer from a plan described in section 401(a) of such Code which includes a

trust exempt from tax under section 501(a) of such Code), may be made in the form of a direct transfer from the plan to a pension plan described in section 401(a) of such Code which includes a trust exempt from tax under section 501(a) of such Code, and

(ii) that it accepts with respect to any individual each of the following:

(I) any transfer to the plan of a plan distribution which is not includable in gross income under section 402(a)(5)(A), 402(a)(7), 403(a)(4)(A), 403(b)(8), or 408(d)(3) of the Internal Revenue Code of 1986,

(II) any plan distribution to such plan described in paragraph (2) or (3) of section 203(e) or paragraph (3) or (4) of section 205(g), and

(III) any direct transfer to such plan from any other simplified employee pension plan, from any portable pension plan, or from any plan described in section 401(a) of the Internal Revenue Code of 1986 which includes a trust exempt from tax under section 501(a) of such Code, and

(IV) any transfer to the plan of a plan distribution of employee contributions, in a direct trustee-to-trustee transfer or within 60 days after the date on which the employee received the distribution, if such contributions are not includable in gross income under chapter 1 of the Internal Revenue Code of 1986 by reason of the distribution.

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SEC. 1030. ALTERNATIVE METHODS OF COMPLIANCE.

(a) * * *

* * * * * * *

(c) The Secretary shall by regulation prescribe an alternative method of compliance with the requirements of this part for simplified employee pension plans. In prescribing regulations pursuant to this subsection, the Secretary shall specifically take into account those attributes which are peculiar to simplified employee pension plans.

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SEC. 1052. MINIMUM PARTICIPATION STANDARDS.

(a)(1)(A) * * *

* * * * * * *

(B)(i) In the case of any plan which provides that after not more than 2 years of service each participant has a right to 100 percent of his accrued benefit under the plan which is nonforfeitable at the time such benefit accrues, clause (ii) of subparagraph (A) shall be applied by substituting "2 years of service" for "1 year of service".

(ii) Subparagraph (A) does not apply with respect to a simplified employee pension plan. No such plan may require, for treatment of any individual on behalf of whom contributions may be made to the plan for any year in compliance with section 408 of the Internal Revenue Code of 1986, that such individual—

(I) have attained any age that is greater than 21, or

(II) have performed service for the employer during more than 3 years of the immediately preceding 5 years.

[(ii)] *(iii)* In the case of any plan maintained exclusively for employees of an educational institution (as defined in section 170(b)(1)(A)(ii) of Title 26) by an employer which is exempt from tax under section 501(a) of Title 26, which provides that each participant having at least 1 year of service has a right to 100 percent of his accrued benefit under the plan which is nonforfeitable at the time such benefit accrues, clause (i) of subparagraph (A) shall be applied by substituting "26" for "21". This clause shall not apply to any plan to which clause (i) applies.

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SEC. 1053. MINIMUM VESTING STANDARDS.

(a) Nonforfeitability requirements

* * * * * * *

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable. *A simplified employee pension plan does not satisfy the requirements of this paragraph unless it further provides that an employee's rights in his accrued benefit derived from the employer's contributions are nonforfeitable.*

(2) A plan *(other than a simplified employee pension plan)* satisfies the requirements of this paragraph if it satisfies the following requirements of subparagraph (A), (B), or (C).

* * * * * * *

(e) CONSENT FOR DISTRIBUTION; PRESENT VALUE; COVERED DISTRIBUTIONS.—(1) If the present value of any vested accrued benefit exceeds $3,500, a pension plan *(other than a simplified employee pension plan)* shall provide that such benefit may not be immediately distributed without the consent of the participant.

(2)(A) A direct transfer to a portable pension plan from any other pension plan of the entire nonforfeitable benefit of a participant under such other pension plan shall not be treated as a distribution in violation of paragraph (1), to the extent such transfer meets the requirements of section 208(b).

(B) For purposes of subparagraph (A), a transfer of less than the entire nonforfeitable benefit shall be treated as a transfer of the entire nonforfeitable benefit if the excluded portion of the benefit consists solely of distributed employee contributions which are not includible in gross income for purposes of the Internal Revenue Code of 1986 by reason of the distribution.

(3)(A) So much of any distribution of the entire nonforfeitable benefit of a participant, beneficiary, or alternate payee (within the meaning of section 206(d)(3)(K)) (other than a distribution of a benefit in the form of stock issued by the employer) as would be subject to additional tax under section 72(t) of the Internal Revenue Code of 1986 if such benefit were distributed other than in a direct transfer to a portable pension plan shall be treated as a distribution in violation of paragraph (1) unless it is made as such a direct transfer to

a portable pension plan, irrespective of any consent to a distribution made in any other manner.

(B) In any case in which a portable pension plan does not accept deposits of less than the dollar amount specified in section 408(k)(2)(C) of the Internal Revenue Code of 1986 (determined with the application of section 408(k)(8) of such Code) for any year with respect to a participant, and the entire nonforfeitable benefit (determined subject to paragraph (2)(B)) of each participant under any other pension plan is directly transferred to such portable pension plan, excluding from such transfer only such benefits with actuarial present values of less than such amount, subparagraph (A) shall not apply with respect to the distribution of each such excluded benefit.

[(2)(A)] *(4)(A)* For purposes of [paragraph (1),] *this subsection,* the present value shall be calculated—

* * * * * * *

[(3)] *(5)* This subsection shall not apply to any distribution of dividends to which section 404(k) of Title 26 applies.

SEC. 1054. BENEFIT ACCRUAL REQUIREMENTS.

(a) * * *

* * * * * * *

(d) EMPLOYEE SERVICE WHICH MAY BE DISREGARDED IN DETERMINING EMPLOYEE'S ACCRUED BENEFITS UNDER PLAN.—

* * * * * * *

(1) a distribution of the present value of his entire nonforfeitable benefit if such distribution was in an amount (not more than $3,500) permitted under regulations prescribed by the Secretary of the Treasury, [or]

(2) a distribution of the present value of his nonforfeitable benefit attributable to such service which he elected to [receive.] *receive, or*

(3) a distribution meeting the requirements of paragraphs (2) and (3) of section 203(e) or paragraphs (3) and (4) of section 205(g).

Paragraph (1) shall apply only if such distribution was made on termination of the employee's participation in the plan. [Paragraph (2)] *Paragraphs (2) and (3)* shall apply only if such distribution was made on termination of the employee's participation in the plan or under such other circumstances as may be provided under regulations prescribed by the Secretary of the Treasury.

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SEC. 1055. REQUIREMENT OF JOINT AND SURVIVOR ANNUITY AND PRERETIREMENT SURVIVOR ANNUITY.

(a) * * *

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(4) This section shall not apply to a simplified employee pension plan.

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(g) DISTRIBUTION OF PRESENT VALUE OF ANNUITY; WRITTEN CONSENT; DETERMINATION.—(1) * * *

* * * * * * *

(3)(A) A Direct transfer to a portable pension plan from any other pension plan of the entire nonforfeitable benefit of a participant under such other pension plan shall not be treated as a distribution in violation of paragraphs (1) and (2), to the extent such transfer meets the requirements of section 208(b).

(B) For purposes of subparagraph (a), a transfer of less than the entire nonforfeitable benefit shall be treated as a transfer of the entire nonforfeitable benefit if the excluded portion of the benefit consists solely of distributed employee contributions which are not includible in gross income for purposes of the Internal Revenue Code of 1986 by reason of the distribution.

(4)(A) So much of any distribution of the entire nonforfeitable benefit of a participant, beneficiary, or alternate payee (within the meaning of section 206(d)(3)(K)) (other than a distribution of a benefit in the form of stock issued by the employer) as would be subject to additional tax under section 72(t) of the Internal Revenue Code of 1986 if such benefit were distributed other than in a direct transfer to a portable pension plan shall be treated as a distribution in violation of paragraph (2) unless it is made as such a direct transfer to a portable pension plan, irrespective of any consent to a distribution made in any other manner.

(B) In any case in which a portable pension plan does not accept deposits of less than the dollar amount specified in section 408(k0(2)(C) of the Internal Revenue Code of 1986 (determined with the application of section 408(k)(8) of such Code) for any year with respect to a participant, and the entire nonforfeitable benefit (determined subject to paragraph (3)(B)) of each participant under any other pension plan is directly transferred to such portable pension plan, excluding from such transfer only such benefits with actuarial present values of less than such amount, subparagraph (A) shall not apply with respect to the distribution of each such excluded benefit.

[(3)(A)**]** *(5)(A)* For purposes of **[**paragraphs (1) and (2),**]** *this subsection,* the present value shall be calculated—

* * * * * * *

SEC. 1081. COVERAGE.

(a) PLANS EXCEPTED FROM APPLICABILITY OF THIS PART.—This part shall apply to any employee pension benefit plan described in section 1003(a) of this title, (and not exempted under section 1003(b) of this title), other than—

(1) * * *

* * * * * * *

(8) an individual account plan (other than a money purchase plan), *a simplified employee pension plan* and a defined benefit plan to the extent it is treated as an individual account plan (other than a money purchase plan) under section 1002(35)(B) of this title; or

* * * * * * *

SEC. 1104. FIDUCIARY DUTIES.

(a) * * *

* * * * * * *

(d)(1) Notwithstanding any other provision of law, in the case of—

(A) a termination of a single-employer plan which involves the distribution of residual assets to an employer,

(B) the purchase of annuities for participants and beneficiaries of a single-employer plan upon its termination, or

(C) the transfer of any excess pension assets of a single-employer plan to an account maintained by the plan under section 401(h) of the Internal Revenue Code of 1986 for the benefit of participants and beneficiaries of the plan,

such distribution, purchase, or transfer shall not be made unless the applicable fiduciary determines that such distribution, purchase, or transfer is in the interests of the plan participants and their beneficiaries.

(2)(A) The applicable fiduciary shall not make a determination under paragraph (1) until the completion of an independent investigation.

(B) The applicable fiduciary shall make in writing the determination under paragraph (1) on the basis of advice from an independent advisor and on the basis of the fiduciary's responsibilities under subsection (a)(1) (other than subparagraph (D) thereof.)

(C) In the case of a distribution described in paragraph (1)(A), the determination under paragraph (1) shall include, but not be limited to, consideration of whether—

(i) an adequate portion of the residual assets are retained in 1 or more replacement plans in order to provide comparable future benefits to all participants and their beneficiaries,

(ii) cost-of-living adjustments are provided to retirees receiving benefits, and

(iii) the termination is part of (or related to) a transaction or series of transactions which maintains the ability of the employer to adequately fund future pension benefits.

(D) In the case of a transfer described in paragraph (1)(C), the determination under paragraph (1) shall include, but not be limited to, consideration of whether—

(i) adequate vesting rights and other protections are adopted by the plan to preserve the rights of participants and their beneficiaries under the pension plan,

(ii) the plan provides that there is no reduction in, or no increase in the cost to employees of, medical benefits provided (in whole or in part) through the account established under section 401(h) of the Internal Revenue Code of 1986, and

(iii) the assets remaining in the pension plan after the transfer are sufficient to ensure the ability of the plan to pay future benefit liabilities, including an adequate cushion of excess assets to protect the funding of the plan.

(3) If an employer maintains separate plans for participants or beneficiaries in pay status and other participants and beneficiaries, such plans shall be treated as 1 plan for purposes of the determination under paragraph (1).

(4) The applicable fiduciary shall make the determination under paragraph (1), and notify the corporation and any affected party of such determination—

(A) in the case of a termination described in paragraph (1)(A) or (1)(B), on or before the date notice of intent to terminate is provided to affected parties under seciton 4041(a)(2), or

(B) in the case of a transfer described in paragraph (1)(C), at least 60 days before the date on which the transfer occurs.

(5) For purposes of this subsection, the term "applicable fiduciary" means—

(A) the named fiduciary, or

(B) to the extent provided in regulations, the fiduciary making the distribution or transfer described in paragraph (1).

* * * * * * *

SEC. 1109. LIABILITY FOR BREACH OF FIDUCIARY DUTY.

(a) * * *

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"(c) Any person who is a fiduciary with respect to a plan who breaches any duty imposed on such fiduciary under section 404(d) shall be personally liable to—

"(1) in the case of a distribution described in section 404(d)(1)(A) or a purchase described in section 404(d)(1)(B)—

"(A) 1 or more plans which replace the terminated plan and cover participants and beneficiaries of the terminated plan, or

"(B) if there are no such replacement plans, to the participants and beneficiaries of the terminated plan, or

"(2) in the case of a transfer described in section 404(d)(1)(C), the plan maintaining the account under section 401(h) of the Internal Revenue Code of 1986,

in an amount equal to the residual assets distributed to the employer (plus interest thereon), the annuities purchased (plus interest thereon), or the amount transferred to such account (plus interest thereon), whichever is applicable, and shall be subject to such other equitable or legal relief as the court may deem appropriate, including removal of such person as fiduciary of the replacement plan."

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TABLE OF CONTENTS

Sec. 1. Short title and table of contents.

* * * * * * *

[Sec. 211. Effective dates.]
Sec. 211. Distributions of accrued benefit under simplified employee pension plans.
Sec. 212. Effective dates.

* * * * * * *

[Sec. 414. Effective date.]
Sec. 414. Special rules for portable pension plans.
Sec. 415. Effective date.

Amend the title so as to read:

To amend title I of the Employee Retirement Income Security Act of 1974 to provide additional responsibilities for a fiduciary of a single-employer pension plan, to provide for pension portability, and for other purposes.

○